82-105 COPY

IN THE SUPREME COURT

OF THE

UNITED STATES

Office - Supreme Court, U.S.
FILED
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OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Appellants,

vs.

MAURICE JOHN KEENAN,

Appellee.

On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Can a state court, consistent with the First and Fourteenth Amendments to the United States Constitution, automatically preclude the public, including public prosecutors, from attending criminal proceedings when a defendant seeks court-appointed counsel?

2. Does the public have a First Amendment constitutional right to know the identity of court-appointed, publicly paid defense counsel in criminal cases, or may the court secretly appoint such counsel *in camera* via *ex parte* proceedings?

3. Under the First and Fourteenth Amendments, may a state court, absent any legislative authority, order that judicial records on the appointment of criminal defense counsel be sealed as "confidential"?

4. Are the People in a criminal case entitled to notice and the opportunity to be heard on the need for two court-appointed defense attorneys in that case?

5. Does it violate due process law for a state court to create a presumption that two defense attorneys are needed in a class of criminal cases, yet deny the People the opportunity to rebut the presumption by having the defense motion made in a secret court session?

PARTIES

The parties in this case are:

The People of the State of California and the Superior Court of the State of California in and for the City and County of San Francisco -- Appellants.[1/]

Maurice John Keenan -- Appellee.

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1. The opinion of the California Supreme Court states that court's determination that "the People should not be a real party in interest." Keenan v. Superior Court (1982) 31 Cal.3d 243, 247 n.5; 31 Cal.3d 424, 428 n.5; 640 P.2d 108, 110 n.5. But, "[w]here as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself, the Court may consider those rights as before it." United States v. Raines, 362 U.S. 17, 22 (1960); see N.A.A.C.P. v. Alabama (1958) 357 U.S. 449, 459-460; Burrows v. Jackson, 346 U.S. 249, 257 (1953). As a result of this very litigation, the People's constitutional rights are abridged without effective means of redress. Hence, they have standing to raise their interest in the due observance of the constitutional guarantees of freedom of the speech and press before this Court. United States v. Raines, 362 U.S. supra at 22.

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The opinions of the California Supreme Court appear at 30 Cal.3d 750, 31 Cal.3d 243, 31 Cal.3d 424, 180 Cal.Rptr. 489, 640 P.2d 108 (1982). The opinion, plus modification, appears as Appendix A. The order denying petition for rehearing is unreported and is attached as Appendix B.

STATEMENT OF JURISDICTIONAL GROUNDS

This Court's jurisdiction arises under 28 U.S.C. § 1257(2) from a final judgment of the California Supreme Court originally issued on February 8, 1982, as modified on May 6, 1982. Timely petitions for rehearing were duly filed on February 23, 1982, and May 21, 1982. On June 3, 1982, the California Supreme Court ordered the second petition for rehearing stricken, denying rehearing on its own motion. Notice of appeal was

timely filed within 90 days of June 3, 1982, on July 14, 1982 (Appendix G).

This proceeding was initiated by appellee ex parte. The record has been deemed "confidential." The petition for rehearing filed in behalf of the People by the California Attorney General on February 23, 1982, following publication of State Supreme Court's opinion, thus created the first opportunity for the People's constitutional claims to be heard. See Herndon v. Georgia, 295 U.S. 441, 444 (1935); Brinkerhoff-Farris Co. v. Hill, 281 U.S. 673, 677-688 (1930). In that petition, the People maintained that the State Supreme Court's construction of California Penal Code section 987.9 rendered the statute repugnant to the United States Constitution. Specifically, it was argued to the court below that, as construed, Penal Code

section 987.9 offended the First Amendment by denying the public their rights to know about, discuss, and attend criminal trial proceedings, and by sealing the record of those proceedings denied the public their right of access to judicial records. It was further maintained that the People's due process rights to notice and the opportunity to be heard were infringed by the secretive proceedings which had been held before the California courts. Accordingly, this Court's appellate jurisdiction has been properly invoked. 28 U.S.C. § 1257(2); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n.3 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-289 (1921). The California Supreme Court has ruled that defense counsel in capital cases can move ex parte for the appointment of a second attorney, and that the making and

the hearing of the motion will then be sealed as confidential.

There will be further trial proceedings in this case. Still, the judgment of the California Supreme Court is final for purposes of its rulings on the confidential appointment of counsel. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 485-488 (1975). For under those rulings, criminal defendants will from now on be able to move clandestinely for the appointment of publicly paid defense attorneys. The record of those proceedings will, under the State Supreme Court's decision, then be hidden from public view. Obviously, there will be no opportunity for the People to learn of such defense motions in future cases since the motions will not be made public. This case thus presents the first and last chance for constitutional

challenges in this Court to the procedures allowed by the California Supreme Court.

This Court's review of the unprecedented rulings in this case (cf. In re Oliver, 333 U.S. 257, 266 (1948)) is necessary because the People of the State of California have been denied their federally guaranteed rights. Under the laws of Congress, no court of the United States other than this Court can reverse or modify the California Supreme Court's judgment for errors of constitutional magnitude. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416 (1923). It is on these grounds that the People invoke this Court's jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. 1; U.S. Const., Amend. 14; California Penal Code, secs.

987, 987.1, 987.2, 987.3, 987.4, 987.6, 987.8, 987.9. The text of these provisions appear at Appendix C.

STATEMENT OF THE CASE

Because the record in this case has been sealed from public view, this Statement is based on the matters of public record contained in the opinions of the California Supreme Court, the orders of that court which have been made public, and the responsive pleadings filed in the action by the California Attorney General.

According to the opinion of the court below, the appellee, Maurice John Keenan, stands accused of murder and six other felonies. Arraigned in October of 1979, he awaits trial on those charges, for which the death penalty has been sought. The present attorney representing appellee was appointed by the court in October of 1980, after a conflict

arose between Keenan and his first court-appointed attorney. As of this date, the case has been delayed from going to trial for over two and one-half years while issues relating to Keenan's court-appointed attorneys have been litigated.

Keenan's attorney moved secretly for state funds to hire experts, investigators, and a second attorney.[2/] A total of $23,000 was given the defense, but the superior court judge refused to award funds for second counsel. This refusal on the part of the superior

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2. These motions were purportedly made on the authority of California Penal Code section 987.9, which permits confidential defense requests for funds to employ experts, investigators and others necessary for the preparation or presentation of the defense in capital cases. Such requests are made before a judge of the superior court other than the judge assigned to the trial of the capital cases in question (See Appendix C).

court was sustained by the California Court of Appeal in a secret written opinion, after appellee petitioned that court for ex parte review.[3/] Review was then sought before the California Supreme Court, which on February 8, 1982, issued its original opinion ordering the superior court to appropriate funds for second counsel, while holding, under the authority of section 987.9, that both the application for such funds and the contents of the application would remain confidential. 30 Cal.3d supra at 753 n.5; 180 Cal.Rptr. supra at 491 n.5; 640 P.2d supra at 110 n.5.

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3. Though the secret opinion has been sealed and cannot be examined, the dissenting opinion of Justice Richardson of the California Supreme Court quotes Justice Rouse's reasons for sustaining the superior court judge's decision. 31 Cal.3d supra at 254 and 435; 180 Cal.Rptr. supra at 495; 640 P.2d supra at 1143.

Following publication of the Supreme Court's opinion, the People filed their first petition for rehearing on the ground, among others, that as construed by the California Supreme Court, Penal Code section 987.9 violated due process and the First Amendment to the United States Constitution.[4/]

On May 6, 1982, the California Supreme Court modified its opinion. Although holding that Penal Code section 987.9 did not authorize the expenditure of State funds for defense counsel, so that this statute would not apply to motions for second counsel, the court nevertheless used that statute's provision for confidentiality "by analogy" to the making and the hearing of a defense motion for the appointment of counsel.

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4. A copy of the People's February 23, 1982, petition for rehearing is separately appended to this Jurisdictional Statement as Appendix D.

31 Cal.3d supra at 249 and 430; 640 P.2d supra at 111.[5/] The justification stated for allowing the motion to be made confidentially was the avoidance of "undue disclosure of defense strategy." Ibid. The opinion as modified, indicated for the first time the court's determination that the People should not be a real party in interest in this proceeding. Compare 30 Cal.3d supra at 753 n.5 and 180 Cal.Rptr. supra at 491 n.5 with 31 Cal.3d supra at 247 n.5 and 31 Cal.3d supra at 428 n.5.

The court's opinion also created a presumption that in cases of "genuine need," a second attorney must be appointed, holding that this presumption was not rebutted here. 30 Cal.3d supra

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5. Since the California Supreme Court's rule of confidentiality in this case is of a legislative nature, it may be considered to be a statute for purposes of 28 U.S.C. § 1257(2). Lathrop v. Donahue, 367 U.S. 820, 824 (1961).

at 759; 31 Cal.3d supra at 253; 31 Cal.3d supra at 434; 180 Cal.Rptr. at 494; 640 P.2d supra at 114.

On May 21, 1982, the People filed a second petition for rehearing asserting that the State Supreme Court had created a species of confidential proceedings wholly unauthorized by law, and that the People's dismissal from this case, absent notice and the opportunity to be heard, was violative of due process of law.[6/] Appellee moved to strike the People's rehearing petition, with the People opposing this motion. The People's opposition was marked "Received" by the California Supreme Court, but before any action was taken, the court ordered the second rehearing

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6. The second petition for rehearing is also separately appended as Appendix E.

petition stricken and denied rehearing on its own motion.[7/]

REASONS WHY THE QUESTIONS PRESENTED DESERVE PLENARY CONSIDERATION BY THIS COURT

The California Supreme Court has in this case tipped the balance on the scales of justice in favor of criminal defendants without any justification whatsoever. Instead of an adversary system of justice, California now sanctions a form of reverse Star Chamber procedure in which the People, including their legal representatives, are denied their rights to attend criminal trial hearings. Only the defense side is heard by the courts, with the records of those proceedings then being labeled confidential and sealed from public view.

Review in this Court is necessary

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7. The People's motion is separately appended as Appendix F.

because, if left uncorrected, the People of the State of California will have been denied the rights guaranteed them under the First Amendment to know what happens at criminal trial proceedings, in order that they may freely discuss this aspect of their governmental affairs. The ruling of the California Supreme Court in this case raises substantial federal questions as it takes giant strides beyond what this Court has ever allowed in terms of closing the public's courtrooms. The State Supreme Court has, in the context of motions for the appointment of criminal defense counsel, created a blanket rule forbidding any public access to those proceedings. This mandatory-closure rule is contrary to this Court's decision of June 23, 1982 in Globe Newspaper Co. v. Superior Court for the County of Norfolk, 50 U.S.L.W. 4759,

which requires a case-by-case determination of the need for denying public access to criminal proceedings.

Moreover, in disregard of the public's right of access to judicial records, recognized since Common Law, the decision in this case orders that records of judicial proceedings on the appointment of criminal defense counsel be sealed under a cloak of confidentiality. Henceforth, motions seeking appointment of criminal defense attorneys will be made secretly, and the public may not even be apprised of one of the most significant pieces of information about a criminal trial--who represents the accused. No limits have been placed on the California courts' power to determine what judicial records should be confidential.

The California Supreme Court has also devised a rule of law presuming

that two defense attorneys are necessary in this case, while at the same time precluding any rebuttal of this court-made presumption. This ruling raises the substantial federal question of whether the People of a State are denied due process of law because a presumption permitting no opposition is, in fact, illusory because it is irrebuttable.

While ostensibly posing as the guardian of criminal defendants accused of capital crimes, the California Supreme Court has trenched upon the fundamental rights of the State's citizens. The balance, which must be kept true (Snyder v. Massachusetts, 291 U.S. 97, 122 (1933)), has been shifted dangerously to favor the minority accused of criminal wrongdoing at the expense of the law-abiding majority. Unless unrestrained judicial authority be allowed to make the People's rights

under the United States Constitution superfluous in California, the judgment in this case must be reversed.

ARGUMENT

1. This Court has very recently held that the First Amendment forbids denying the public access to criminal trial proceedings based on a mandatory rule not allowing for the particularized consideration of individual cases. Globe Newspaper Co. v. Superior Court, etc., supra. Rather, there must be a case-by-case determination that the denial of public access is "necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." 50 U.S.L.W. at 4762. This decision gives recognition to the public's First Amendment's right of access to criminal trials, necessary to ensure that there is informed discussion of governmental affairs. Id. at 4761.

This case involves the important phase of a criminal trial where indigent criminal defendants have lawyers appointed by a State court to represent them. See Gideon v. Wainwright, 372 U.S. 335 (1963). Under the ruling challenged in this case, motions seeking the appointment of second counsel in capital cases are to be automatically made in secret, without notice to the prosecution, the public in general, or the press. The only interest identified by the California Supreme Court in support of this blanket exclusionary rule is "[t]o avoid undue disclosure of defense strategy, ..." 31 Cal.3d at 249 and 430; 640 P.2d at 111.

This reasoning, however, does not justify keeping the motion itself, as opposed to any hearing on that motion, confidential. Simply knowing that a criminal defendant has moved to have

additional counsel appointed at public expense does not disclose any defense strategy to the prosecution. If, in individual cases, a trial judge decides that a hearing on the motion made in public session would result in undue disclosure of defense strategy, then the judge can order that portion of the hearing held in camera. The court's ruling on the motion would then be made in public session. Such individualized consideration of the need to hold an in camera hearing comports with this Court's decision in Globe Newspaper Co. requiring that "where the State attempts to deny the right of access to inhibit the disclosure of sensitive information, it must be shown that the denial is ... narrowly tailored to serve that interest." 50 U.S.L.W. supra at 4762. The present ruling of the California Supreme Court is not narrow, but all-

encompassing. Regardless of the circumstances, the mere making of a defense motion for co-counsel is held to require confidentiality. As a mandatory rule that applies automatically, the decision of the California Supreme Court is unconstitutional.

2. Although we believe that Globe Newspaper Co., alone, warrants summary reversal of this case for reconsideration in light of that opinion, there are additional reasons why the judgment of the California Supreme Court is repugnant to the United States Constitution. This case does not come before this Court, "encased in the armor wrought by prior legislative deliberation" (Bridges v. California, 314 U.S. 252, 260 (1941)), since the California Legislature has not authorized ex parte proceedings of the kind permitted here. Absent any legislative directive, the California

Supreme Court has, by analogy to Penal Code section 987.9, effectively legislated into law that statute's trappings of confidentiality, denial of both notice and the opportunity to be heard, and the sealing of judicial records. This Court long ago recognized that illegitimate and unconstitutional practices like the ones at issues here get their first footing by silent approaches and slight deviations from legal modes of procedure. Boyd v. United States, 116 U.S. 616, 636 (1886). If a court can order that motions for court-appointed counsel are to be made ex parte, absent any legislative authorization, then that court can decide to consider other motions ex parte without allowing opposition. The proceedings can then be ordered sealed as "confidential," so that the public never learns about the court's

actions. This should not be permitted in a democratic society.

The rule of State law fashioned by the California Supreme Court, moreover, indiscriminently allows defense counsel in criminal cases to move ex parte for second counsel without any showing of necessity. Such ex parte proceedings should be exceptional and tolerated only in cases of manifest necessity. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164-165 (1951) (Frankfurter, J. concurring). There has been no showing of a need in this case to have motions for counsel made ex parte. It should be axiomatic that "[t]he people of a state are also entitled to due process of law." Stein v. New York, 346 U.S. 156, 196-197 (1952); see Fay v. New York, 322 U.S. 261, 288-289 (1946). Under our adversary system of criminal justice, it is

"the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." United States v. Nixon, 418 U.S. 683, 707 (1973). California's judiciary should be held to no lesser standard in which justice becomes a one-way street for criminal defendants. A democratic government must practice fairness; and fairness can rarely be obtained by secret, one-sided determinations. Fuentes v. Shevin, 407 U.S. 67, 81 (1972). It is the People's contention that where no need has been demonstrated for requiring ex parte consideration of a criminal defendant's motion for a second court-appointed attorney, then the consequent denial of the public's First Amendment and due process rights cannot be sustained. There is simply no place within the area of basic freedoms guaranteed by the First Amendment for ex parte orders without

giving the opposing party an opportunity to participate. Carroll v. Princess Anne, 393 U.S. 175, 180 (1968).

3. In Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-598 (1978) this Court acknowledged the existence of a Common Law right of access to judicial records. See generally Application of National Broadcasting Co., Inc., 635 F.2d 945, 949 (2d Cir. 1980). In the absence of any statute restricting the public's right of access to judicial records, there is a presumption in favor of such access. Nixon v. Warner Communications, Inc., 435 U.S. supra at 602. This right of access can be circumscribed only after careful scrutiny and weighing of the counterbalancing interests offered in opposition to it. Ibid. Here, no State statute has authorized the secreting of Keenan's applications

for counsel. There has been no weighing or balancing of the justifications, if any, for keeping those applications hidden. Only judicial edict has had that effect. On this score, too, the People would contend that the public's First Amendment rights to know the business of their public servants in the judiciary have been unconstitutionally abridged.

The American Bar Association's Special Committee on Minimum Standards for the Administration of Criminal Justice has recommended that whenever all or any part of a pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings should be kept and made available to the public following the completion of trial or disposition of the case without trial. ABA Standards for Criminal Justice, sec. 3.1, Pretrial Hearings.

The commentary to this section states:

> "Moreover, and this is an essential aspect of the recommendation, a complete record of the proceedings from which the public is excluded must be kept and must be made available at the completion of trial or disposition without trial. This is designed to ensure full public awareness and discussion of any alleged impropriety in the proceedings themselves." (Emphasis in original.)

Permitting ex parte proceedings to be held, and then sealing the record from public view, first ensures public ignorance of the proceedings, and next assures that there will never be awareness or discussion of anything improper

in the proceedings themselves.

The reasons why the People must know about a criminal defendant's motions for court-appointed counsel are readily apparent. Should the defendant be convicted, and on appeal or in subsequent collateral attack of the judgment should he challenge the competency of his trial attorney, then the State would be obliged to defend defense counsel's conduct in handling the trial. How, we ask, can counsel's conduct be defended if there have been a series of ex parte communications with the court that are deemed confidential? If trial counsel somehow feels inadequate for the task, then this should be known. The potential for mischief inherent in allowing the kind of ex parte motions permitted here should give one pause to ponder the wisdom of ordering the record in this class

of cases sealed. At the very least, the People should be apprised that there was a motion by counsel.

Yet, under the present ruling of the California Supreme Court, because the record of a defense motion has been sealed, the People might not even know the identity of counsel appointed by the court, much less whether that individual was, for example, a member of the State Bar. Counsel's identity is unlike that of a potential defense witness, whose identity might reveal something of a privileged nature. No privilege attaches to the fact that an attorney has been appointed for a client, since "[t]he fact that a lawyer is appearing in a representative capacity must always be out in the open." Wise, Legal Ethics (1970) at 334. To our knowledge appointments of counsel have never before been regarded as matters which

can be accomplished in secret proceedings. If, indeed, court-appointed counsel will eventually be "of record," so that all may know his or her identity, then the question arises: What is the need for the prior restraint on this information? This Court has accorded the most exacting scrutiny to prior restraints on First Amendment freedoms, with those restraints bearing a heavy presumption against their constitutional validity. Smith v. Daily Mail Publishing Co., 433 U.S. 97, 102 (1979); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). It remains a mystery, absent any attempt at explanation, why the mere making of a defendant's motion for a second court-appointed attorney must be done in camera on an ex parte basis, with the record then sealed from public view.

4. Furthermore, there is the matter of the California Supreme Court's creation of what seems to be an evidentiary presumption that in cases of "genuine need" a second attorney should be appointed. This presumption, in turn, winds up as an empty promise. In an ex parte proceeding, where no notice is given and no opposition is permitted, the presumed need for a second attorney cannot be rebutted. Due process of law should require that before the public's property interest, in the form of tax dollars, are taken away via a presumption, there should be a chance for rebuttal. That is impossible under the present ruling of the California Supreme Court. This Court has repeatedly held that presumptions denying a fair opportunity for rebuttal violate the due process clause of the Fourteenth

Amendment. Vlandis v. Kline, 412 U.S. 441, 446 (1973).

5. The decision in this cases stands alone in Anglo-American jurisprudence. Never before in any reported decision has a court secretly appointed counsel to represent a criminal defendant. The California Supreme Court here has been able to accomplish this result by the admitted misapplication of a statute never intended for this use by the California Legislature. The unprecedented decision in this case robs the People of the State of California of their valued federal constitutional rights, without discernable benefit to the criminal accused except in the closing of court hearings from public scrutiny or opposition. We appeal to this Court, in its role as the protector of constitutional guarantees, to prevent

this erosion of the People's rights. While a decision appointing a second defense counsel in a capital case may not, in and of itself, be a troublesome prospect, the procedures to be employed under this case when doing so raise grave concerns surrounding the restrictions on the public's rights to know about and participate in their governmental affairs in a free society. Openness, rather than stealth, should be the basis upon which our criminal court system operates.

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CONCLUSION

The judgment in this case should be reversed summarily for further proceedings in light of Globe Newspaper Co., supra. Alternatively, full briefing should be required, the case set for oral argument, and the judgment reversed.

DATED: July 16, 1982

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APPENDIX A

C O P Y

SUPREME COURT
FILED
FEB 8 1981
LAURENCE P. GILL, CLERK

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,	)	
	)	
Petitioner,	)	S.F.24309
	)	
v.	)	
	)	
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,	)	
	)	
Respondent;	)	
	)	
THE PEOPLE,	)	
	)	
Real Party in Interest.	)	
	)	

Maurice Keenan, an indigent defendant charged with a capital offense, seeks a writ of mandate to compel respondent superior court to grant his motion for public funds to pay for the services of a second attorney to assist in the preparation of his defense. He relies on Penal Code section 987.9 as

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SEE DISSENTING OPINION

authority for this request.[1/] For the reasons that follow, we hold that the

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1/ Section 987.9 provides:

"In the trial of a capital case, the indigent defendant, through his counsel, may request the trial court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that such an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

"At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section."

Unless otherwise specified, all statutory references hereinafter are to the Penal Code.

trial court abused its discretion in refusing to order such funds.

Defendant was arraigned in October 1979 and charged with murder and six other felony counts.[2/] Special circumstances were also alleged, thus subjecting him to a possible death sentence. (§ 190.2, subds. (a)(17)(i), (a)(17)(vii).) M. Gerald Schwartzbach was appointed to represent defendant on October 7, 1980.[3/] Schwartzbach had some familiarity with the case as a result of his representation of Linda

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2/ The indictment charged the following seven felonies: count I, murder (§ 187); count II, burglary (§ 459); counts III and V, attempted robbery (§ 644); count IV, robbery (§ 211); count VI, possession of a sawed-off shotgun (§12020); count VII, possession of a gun by a felon (§ 12021).

3/ Defendant had been assigned private counsel at arraignment after the public defender declared a conflict of interest (§ 987.2). Subsequently a conflict arose between defendant and his original counsel; thereupon Mr. Schwartzbach was appointed.

Keenan, who was accused of being an accessory after the fact to the offenses charged against defendant.[4/] Two days after Schwartzbach's appointment, trial was set for November 24, 1980, despite his plea that he could not be ready before January 1, 1981.

Shortly after the trial date was set, defendant made a motion for an in camera hearing that funds be allocated pursuant to section 987.9 to provide expert and investigatory help in the preparation of the defense.[5/] Specifically,

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4/ Defendant and Linda Keenan specifically waived any conflict of interest that might arise as a result of Schwartzbach's joint representation of them. Linda Keenan's trial has since been severed from that of defendant.

5/ Section 987.9 (fn. 1, ante) provides that both the request for such funds and the contents of the application shall remain confidential. Accordingly when we first considered this matter we directed the Court of Appeal to maintain the confidentiality of defendant's request. Defendant has since waived his

funds were requested for a private investigator, a serology expert, psychiatric and neurological testing, and jury selection experts. The court granted $16,000 for these purposes.[6/] Funds were also requested for a second attorney on the ground that the case presented complex factual and legal issues, but this request was denied. Counsel then unsuccessfully sought a continuance of the trial date. A renewed motion for funds for a second attorney was subsequently denied. Defendant seeks a writ of mandate to compel the trial court to allocate such funds.

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right to confidentiality for the limited purpose of conducting oral argument before this court and publication of this opinion. The remainder of the record, however, remains confidential.

6/ Another $7,000 was later granted, making the total allocated for investigation and experts $23,000.

The right to counsel of a person charged with a crime is guaranteed by both the federal and state Constitutions. (U.S. Cont., 6th Amend.; Cal. Const., art. I, § 15.) To meet the constitutional standard the defendant must be provided effective legal assistance in the preparation and trial of the case. (Powell v. Alabama (1932) 287 U.S. 45, 71; McMann v. Richardson (1970) 397 U.S. 759, 771.) If a criminal defendant is unable to employ private counsel the court must appoint an attorney to represent him. (Gideon v. Wainwright (1963) 372 U.S. 335.) The right to effective counsel also includes the right to ancillary services necessary in the preparation of a defense. (In re Ketchel (1968) 68 Cal.2d 397; People v. Faxel (1979) 91 Cal.App.3d 327, 330; Mason v. State of Arizona (9th Cir. 1974) 504 F.2d 1345, 1351.)

In People v. Jackson (1980) 28 Cal.3d 264, we had occasion to consider whether an indigent defendant in a capital case had an absolute statutory or constitutional right to be represented by two appointed attorneys. Defendant in that case relied on section 1095, which provides that "If the offense charged is punishable with death, two counsel on each side may argue the cause. In any other case the court may, in its discretion, restrict the argument to one counsel on each side."

We held in Jackson that section 1095 "does not purport to authorize or mandate the appointment of additional counsel at public expense, but only to permit the argument of the case by two counsel." (28 Cal.3d at pp. 285-286.) We went on to hold there was no merit to the claim that equal protection principles compelled appointment of a second

attorney for an indigent defendant in a capital case simply because an affluent defendant exercising his right under section 1095 was entitled to have two attorneys argue his case. We reasoned that precise equality is not required, and concluded that "equal protection demands are satisfied by permitting the trial court, in its discretion, to appoint additional counsel at public expense if the circumstances in a particular case appear to require such an appointment." (Id. at p. 287.)[7/] As authority for the

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7/ The Ninth Circuit reached a similar conclusion in Mason v. Arizona (9th Cir. 1974) supra, 504 F.2d 1345. In Mason the defendant was represented by appointed counsel after the public defender's office declared a conflict of interest. The defendant requested funds for a private investigator, arguing that he would have had access to one had he been represented by the public defender. The court held that equal protection standards were met because the trial court had discretionary power to appoint an investigator. The court stressed that

trial court to exercise this discretion, we cited section 987.9. As we have seen, under the terms of that section the defense may make a confidential application for funds for investigators, experts and others reasonably necessary for the preparation of the defense of an indigent defendant in a capital case. The judge must rule on the reasonableness of the request, using as his criterion "the need to provide a complete and full defense for the defendant." (Fn. 1, ante.)

In Jackson we refused to find that the trial court had abused its discretion in this regard. Noting that the defendant had failed to present any specific, compelling reasons for appointment of a second attorney, we concluded

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the public defender's office operated under a restricted budget and thus also was forced to make choices about how to allocate resources.

that "neither the facts nor the legal issues . . . appear[ed] to have been so complex as to require the assistance of additional counsel as a matter of law." (28 Cal.3d at p. 288.) Nevertheless, Jackson stands for the proposition that in appropriate circumstances an indigent defendant in a capital case should have a second court-appointed attorney. The appointment is not an absolute right, however, and the decision as to whether funds will be allocated for this purpose remains within the sound discretion of the trial court.

That discretion, of course, must be "guided by legal principles and policies appropriate to the particular matter at issue." (People v. Russel (1968) 69 Cal.2d 187, 195; Bullis v. Security Pac. Nat. Bank (1978) 21 Cal.3d 801, 815.) In deciding a motion under section 987.9 the court is in every instance dealing with

a case in which the death penalty may be imposed. The United States Supreme Court has expressly recognized that death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed. (Gardner v. Florida (1977) 430 U.S. 349, 357; Gregg v. Georgia (1976) 428 U.S. 153, 187.) Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. (United States v. See (9th Cir. 1974) 505 F.2d 845, 853, fn. 13; Powell v. Alabama, supra, 287 U.S. at p. 71.)

The Legislature has also recognized that a defendant in a capital case may

need certain protections not granted to one charged with an offense carrying a lesser penalty.[8/] Section 987.9 demonstrates this concern by its broad language authorizing funds for "the preparation or presentation of the defense" and its direction that in ruling on a defendant's request the court must be guided by "the need to provide a complete and

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8/ Examples of the Legislature's different treatment of capital cases include sections 1095, 1070, and 1018. Section 1095, as discussed earlier, permits argument by two counsel for both sides in a capital case. Section 1070 allows 26 peremptory challenges by the defense or prosecution in a case in which the defendant faces the death penalty or life imprisonment, while fewer challenges are allowed for less serious offenses. Section 1018 prohibits a plea of guilty when the death penalty may be imposed unless defense counsel has agreed to the plea. In applying section 1018, we noted the Legislature's "careful distinction between capital and noncapital cases" and emphasized that the statute was intended as a "further independent safeguard against erroneous imposition of a death sentence." (People v. Chadd (1981) 28 Cal.3d 739, 747, 750.)

full defense.[9/]

Another factor the trial court must weigh in exercising its discretion is the importance this court has attached to pretrial preparation in providing a criminal defendant effective legal assistance. Part of counsel's responsibility to a client is to become thoroughly familiar with the factual and legal circumstances of the case prior to trial. (People v. Frierson (1979) 25 Cal.3d 142, 163; People v. Pope (1979) 23 Cal.3d 412, 424-425; see also 1 ABA Standards for Crim. Justice (2d ed. 1980) The Defense Function, pp. 4-42.) "Representation of an accused murderer is a mammoth responsibility." (In re

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9/ Similar services may be provided to a noncapital defendant pursuant to section 987.2, which allows appointed counsel reimbursement of necessary expenses. (Puett v. Superior Court (1979) 96 Cal.App.3d 936, 939; People v. Faxel, supra, 91 Cal.App.3d 327, 330.)

Hall (1981) ___Cal. 3d ___, ___.) In a murder prosecution that is factually and legally complex, the task of effectively preparing for trial places a substantial burden on defense attorney. This is particularly true of a capital case, since the possibility of a death penalty raises additional factual and legal issues. This burden may be lightened by employment of investigators and experts, but the ultimate responsibility for coordinating the investigation and assimilating the results must remain with an attorney sensitive to the potential legal issues involved. Because many of the tasks involved in preparation for trial cannot be delegated to nonattorneys, the court cannot assume that authorization of funds for an investigator makes appointment of a second attorney unnecessary. Rather, in assessing the need for another attorney the court must focus on the complexity

of the issues involved, keeping in mind the critical role that pretrial preparation may play in the eventual outcome of the prosecution.

In the instant case, defendant presented the trial court with specific facts and arguments of the type we found lacking in Jackson, to support his motion for a second attorney. The declarations accompanying the motion stressed the factual and legal complexity of the case. Counsel stated that it would be necessary to interview approximately 120 witnesses in order to develop and prepare potentially meritorious defenses, and that he anticipated extensive scientific and psychiatric testimony would be produced at trial, all of which would require extraordinary preparation by him. In addition, defendant was charged in five other criminal cases pending before the superior court, and

counsel had been informed that the prosecution intended to offer at some phase of the trial evidence related to all those cases.[10/] Counsel pointed out that this would necessitate his familiarity with the facts and legal issues involved in those charges as well as the immediate homicide case.

The difficulty of preparation was compounded, counsel argued, by the inherent problem present in any capital case of simultaneous preparation for a guilt and a penalty phase of the trial. He noted that the issues and evidence to be developed in order to support mitigation of the possible death sentence were substantially different from those likely to be considered during the guilt phase.

10/ Subsequent to the in camera hearing counsel discovered four more criminal incidents evidence of which may be introduced at trial.

Counsel acknowledged that some of this task would be undertaken by trained investigators, but contended that supervision and assimilation of the investigative results were of necessity a responsibility for an attorney to perform.

Counsel also informed the court that he intended to make numerous pretrial motions as part of the defense effort and anticipated that review of some of these motions might be necessary. He asserted that only the assistance of another qualified attorney would be usefull in preparation and argument of these motions.[11/]

Counsel's final contention was that his request for funds for a second

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11/ After the motion for a second attorney was denied, counsel made two additional pretrial motions in the trial court and sought review when both motions failed.

attorney should have been considered in light of the early date set for trial. As we have seen, trial was set to begin eight weeks after counsel's appointment despite his protest that he could not adequately prepare the defense in that time.

In denying the motion the court did not question the factual assertions made by defendant but declared instead that a criminal attorney, working alone, should be capable of adequately defending a capital case and that Schwartzbach could "ably and competently perform that task." The court also stated that Schwartzbach had ample time to become familiar with the issues in the case as a result of his earlier involvement as counsel for Linda Keenan and thus had no need for another attorney to aid in trial preparation.

These reasons are inadequate as a matter of law to justify denial of

defendant's motion. The demands of preparing for a murder case when the defendant faces the death penalty cannot be compared to the much more limited task of defending against a charge of being an accessory after the fact. While it is true that Schwartzbach may have required some knowledge of the general facts and issues involved in this case, it is unreasonable to expect that he could have performed the careful pretrial investigation and preparation we have deemed essential to the representation of a capital defendant. Because the crime with which Linda Keenan was charged involved circumstances occurring only after the actual homicide, it was unlikely that counsel could necessarily be familiar with the specific factual or legal defenses available to this defendant. Furthermore, counsel was faced with the necessity of investigating the

other crimes with which defendant had been charged, as well as preparing for the penalty phase of the trial. These tasks were different both in nature and scope from the matters involved in the defense of Linda Keenan.

As indicated above, the court declared that a criminal attorney should be capable of defending a capital case without the assistance of a second lawyer. But this view fails to take into account the showing made by Schwartzbach of the reasons why a second attorney is justified under the facts of this particular case, e.g., the complexity of the issues, the other criminal acts alleged, the large number of witnesses, the complicated scientific and psychiatric testimony, and the extensive pretrial motions, as to some of which review would be sought in the event of adverse

rulings.[12/] The very purpose of section 987.9 is to provide the defendant additional assistance in a capital case when the circumstances warrant it; thus the court abused its discretion in failing to address the specific reasons advanced by Schwartzbach in support of the motion.

Moreover, the section provides that the court shall be guided by the need of the defendant for a "complete and full" defense. This language suggests that the Legislature intended that the court make a careful inquiry as to the need for additional assistance and that it

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12/ The People denigrate defendant's problem by declaring that the practice of the prosecutor in San Francisco is to have only one attorney handle the case. That point overlooks the large staff of attorneys for the People readily available both for trial assistance and for the review process after denial of pretrial motions; defendant must pursue such review while preparing for trial, whereas the prosecutor has the assistance of the Attorney General's office for this purpose.

apply a higher standard than bare adequacy to a defendant's request for assistance. If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a showing of genuine need, and certainly in circumstances as pervasive as those offered by the attorney in this case, a presumption arises that a second attorney is required. The trial court should have found that the presumption was not rebutted here.

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Let a peremptory writ of mandate issue directing respondent court to allocate reasonable funds to pay for a second attorney.

MOSK, J.

WE CONCUR:

BIRD, C.J.
NEWMAN, J.
KAUS, J.
BROUSSARD, J.
*TOBRINER, J.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

COPY

KEENAN v. SUPERIOR COURT

S.F. 24309

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent. In my view, the trial court did not abuse its broad discretion in denying petitioner the services of a second court-appointed attorney at public expense.

In People v. Jackson (1980) 28 Cal.3d 264, 287, we explained that the trial court in a capital case has discretion to "appoint additional counsel at public expense if the circumstances in a particular case appear to require such an appointment." We indicated, however, that the defendant is required to make a "'substantial showing' that, among other things, 'the cause of justice will thereby be served.' [Citations.]" (Ibid.) Finally, in upholding the trial court's denial of

additional counsel in Jackson, we noted that "the trial court had full opportunity to observe counsel in the course of extensive argument on pretrial matters prior to its ruling . . . and accordingly was well positioned to evaluate counsel's ability." (Pp. 287-288.)

The majority now discards Jackson's requirement that defendant make a "substantial showing" of his need for a second attorney, substituting in its place a "presumption" of such need arising whenever a "genuine need" is established. (Ante, p. __ [maj. opn., at p. 13].) No authorities are cited to support the majority's creation of such a presumption.

In the present case, as in Jackson, the trial court had an ample opportunity for determining that a second court-appointed attorney was unnecessary to

assure petitioner a full and complete defense. Justice Rouse in his opinion for the Court of Appeal in this case observed, "we have thoroughly reviewed the sealed documents and transcripts bearing upon petitioner's request for the employment of a second attorney at public expense, and we have also conducted our own in camera hearing. Defendant does not contend, nor was there any indication to us, that counsel presently assigned to the case is not fully qualified and capable of conducting a fair and adequate defense to the charges, both in the substantive, and, if necessary, the penalty, phase of trial. Many of the tasks for which defendant seeks help from an additional lawyer involve pretrial preparation and are essentially investigative in nature. These, we submit, can be more appropriately carried out by qualified

investigative personnel and other experts acting under the direction and supervision of assigned counsel. Funds have already been provided to defense counsel for this purpose. It is our determination that respondent superior court did not abuse its discretion in denying petitioner's request for funds for the employment of a second attorney and that said court's order of denial was entirely proper and must be upheld."

I fully concur in Justice Rouse's careful analysis. In addition to the services of his present competent counsel, I further observe that, following the in camera hearing in November 1980, the trial court granted petitioner's request for a criminalist, an investigator, a jury selection service, and psychiatric, psychological and neurological testing, and I have no reason to believe that the trial court would deny

additional funds for other services if they prove necessary to petitioner's defense. The trial court can be trusted to continue its sensitive watch over these proceedings. If under Jackson, the court becomes convinced that a second counsel is needed one can be appointed. Our intervention is not required.

In addition to my disagreement with the majority's reasoning, I disagree with its result as well. The majority unconditionally directs the trial court "to allocate reasonable funds to pay for a second attorney" (ante, p. __ [maj. opn., at p. 13]). At best it should remand the cause for reconsideration of petitioner's motion in light of the majority opinion. The record discloses that more than a year has passed since petitioner's motion was first denied. Surely, some trial preparation must have

been completed during the course of a year. Petitioner may no longer require the services of a second attorney. The hearings previously conducted should be renewed to ascertain petitioner's present need for additional legal assistance, pursuant to the wholly new guidelines which are now judicially created by the majority.

Because I conclude that defendant is being fairly and generously treated by the trial court system, I would sustain its action and deny the peremptory writ.

RICHARDSON, J.

KEENAN v. SUPERIOR COURT

S.F. 24309

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C O P Y

SUPREME COURT
FILED
MAY 6 1982
LAURENCE P. GILL, CLERK

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

MAURICE JOHN KEENAN,	)	
	)	
Petitioner,	)	S.F.24309
	)	
v.	)	
	)	
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,	)	
	)	
Respondent.	)	

MODIFICATION OF OPINION

BY THE COURT:

The above-entitled opinion, appearing at 30 Cal.3d 750, is hereby modified in the following respects:

1. Change the last sentence of the first paragraph on p. 752 to read: For the reasons that follow, we hold that the trial court abused its discretion in denying appointment of additional counsel but that the appointment should be

made under section 987, subdivision (b), and that section 987.9's provisions for confidentiality are applicable by analogy to such motions.

2. Change the second sentence of footnote 5 on page 753 to read: Accordingly when we first considered this matter we directed the Court of Appeal to maintain the confidentiality of defendant's request and determined that the People should not be a real party in interest.

3. Delete the last three sentences of the second full paragraph on page 754 (commencing, "As authority . . . .").

4. Delete the last sentence of the paragraph that overlaps pages 754 and 755, and insert the following text:

As authority for the trial court to exercise this discretion, Jackson cited section 987.9. As we have seen, under the terms of that section the defense may

make a confidential application for funds for "investigators, experts and others" reasonably necessary for the preparation of the defense of an indigent defendant in a capital case. The section does not expressly refer to appointment of an additional attorney, though its applicability for that purpose was assumed in Jackson. Here, however, the Attorney General, appearing as amicus curiae, contests that applicability, pointing out that funds to implement section 987.9 must be wholly provided by the state (Rev. & Tex Code, §§ 2207, 2231), whereas the state reimburses counties for no more than 10 percent of the cost of appointed counsel (§ 987.6).

The wording of section 987.9, together with its legislative history, lead us to conclude that it was intended to supplement pre-existing provisions

for employment of defense counsel at public expense by making provision for services ancillary to those of counsel.[8/]

Section 987, subdivision (b), provides that "[i]n a capital case, . . . [i]f the defendant is unable to employ counsel, the court shall assign counsel to defend him." That section, together

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8/ Section 987.9 was enacted as chapter 1048 of the 1977 Statutes. The Legislative Counsel's digest of the chapter states: "Existing law provides for the assignment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel. [¶] This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases. [¶] The bill would appropriate $1,000,000 from the General Fund to the State Controller for allocation and disbursement to local agencies. [¶] This bill would take effect immediately as an urgency statute, but would be operative only if SB 155 is chaptered."

Senate Bill 155, referred to in chapter 1048, was enacted at the same legislative session and became chapter 316, providing for the death penalty (former §§ 190-190.5; § 190.6).

with other provisions for court-appointed counsel (see §§ 987.2-987.8), provides ample authority for appointment of an additional attorney shown to be necessary for defense of a capital case. To avoid undue disclosure of defense strategy, defendant is entitled to the application, by analogy, of section 987.9's provisions for confidentiality to the making and hearing of the motion for such appointment. (See Puett v. Superior Court (1979) 96 Cal.App.3d 936, 940, fn. 2; People v. Faxel (1979) 91 Cal.App.3d 327, 330, fn. 1.) The appointment is not an absolute right, however, and the decision as to whether an additional attorney should be appointed remains within the sound discretion of the trial court.

5. Renumber footnotes 8, 9, 10, 11, and 12 as footnotes 9, 10, 11, 12, and 13 respectively.

6. Delete the second sentence of the full paragraph on page 755.

7. Change the last sentence of the second full paragraph on page 758 to read: Thus the court abused its discretion in failing to address the specific reasons advanced by Schwartzbach in support of the motion.

8. Delete the first two sentences of the paragraph overlapping pages 758 and 759 and in their place insert the following text:

Moreover, section 987.9, though not providing for appointment of counsel, reflects a legislative intent that the court be guided by a capital defendant's need for a "complete and full defense." That intent, together with the constitutionally mandated distinction between death and other penalties, requires that the trial court apply a higher standard

than bare adequacy to a defendant's request for additional counsel.

9. Delete the last sentence of the opinion, on page 759, and in its place insert the following text:

Let a peremptory writ of mandate issue directing respondent court to appoint a second attorney for defendant.

C O P Y

KEENAN v. SUPERIOR COURT

S.F. 24309

MODIFICATION OF DISSENTING OPINION

By reason of modification of the majority opinion herein, the dissenting opinion, appearing at 30 Cal.3d 759, is modified by striking from page 760 the second sentence of the last paragraph on that page and substituting the following:

The majority unconditionally directs the trial court "to appoint a second attorney for defendant" (ante, p. 759).

RICHARDSON, J.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,	)	
	)	
Petitioner,	)	S.F.24309
	)	
v.	)	
	)	
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,	)	
	)	
Respondent.	)	

The Attorney General's petition for rehearing is stricken as such but has been considered as if it were an amicus curiae brief suggesting a rehearing on the court's own motion. Rehearing is DENIED.

Richardson, J., is of the opinion that the petition should be granted.

APPENDIX C

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, of the press; . . . .

AMENDMENT XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

CALIFORNIA PENAL CODE

§ 987. Advising defendant on arraignment of right to counsel; assignment of counsel; financial statement

(a) In order to assist the court in determining whether a defendant is able to employ counsel in any case, the court may require a defendant to file a financial statement under penalty of perjury. The financial statement shall be confidential and privileged and shall not be admissible in evidence in any criminal proceeding except the prosecution of an alleged offense of perjury based upon false material contained in the financial statement. The financial statement shall be made available to the prosecution only for purposes of investigation of an alleged offense of perjury based upon false material contained in the

financial statement at the conclusion of the proceedings for which such financial statement was required to be submitted. The financial statement shall not be confidential and privileged in a proceeding under Section 987.8.

(b) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.

(c) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to him.

§ 987.1 Counsel at preliminary examination; continuity in representation

Counsel at the preliminary examination shall continue to represent a defendant who has been ordered to stand trial until the date set for his arraignment in superior court unless relieved by the court upon the substitution of other counsel or for cause.

§ 987.2 Assigned counsel; compensation public defenders; fees chargeable to department of corrections

(a) In any case in which a person, including a person who is a minor, desires but is unable to employ counsel and in which counsel is assigned in the superior court, municipal court, or justice court to represent such a person in a criminal trial, proceeding or appeal, such counsel, in a county or city and county in which there is no public defender, or in a case in which the court finds that because of conflict of interest or other reasons the public defender has properly refused to represent the person accused, shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county.

(b) The sum provided for in subdivision (a) may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the

total amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board of supervisors for the cost of assigned counsel in such cases.

(c) The board of supervisors may by contract provide that any public defender duly appointed or elected may charge reasonable fees to the Department of Corrections for representing inmates of prisons under its control, and the Department of Corrections may upon approval by the court pay such fees into the county treasury to be placed in the general fund of the county.

(d) Counsel shall be appointed to represent, in the municipal or justice court, a person who desires but is unable to employ counsel, when it appears that such appointment is necessary to provide an adequate and effective defense for defendant.

§ 987.3 Court-appointed counsel; compensation and expenses; criteria

Whenever in this code a court-appointed attorney is entitled to reasonable compensation and necessary expenses, the judge of the court shall consider the following factors, no one of which alone shall be controlling:

(a) Customary fee in the community for similar services rendered by privately retained counsel to a nonindigent client.

(b) The time and labor required to be spent by the attorney.

(c) The difficulty of the defense.

(d) The novelty or uncertainty of the law upon which the decision depended.

(e) The degree of professional ability, skill, and experience called for and exercised in the performance of the services.

(f) The professional character, qualification, and standing of the attorney.

§ 987.4 Reimbursement by parent or guardian for services of public defender or assigned counsel in representing a minor

When the public defender or an assigned counsel represents a person who is a minor in a criminal proceedings, at the expense of a county, the court may order the parent or guardian of such minor to reimburse the county for all or any part of such expense, if it determines that the parent or guardian has the ability to pay such expense.

§ 987.6 State payments to counties for providing counsel for persons unable to afford counsel

(a) From any state moneys made available to it for such purpose, the Department of Finance shall, pursuant to this section, pay to the counties an amount not to exceed 10 percent of the amounts actually expended by the counties in providing counsel in accordance with the law whether by public defender, assigned counsel, or both, for persons charged with violations of state criminal law or

involuntarily detained under the Lanterman-Petris-Short Act, Division 5 (commencing with Section 5000) of the Welfare and Institutions Code, who desire, but are unable to afford, counsel.

(b) Application for payment shall be made in such manner and at such times as prescribed by the Department of Finance and the department may adopt rules necessary or appropriate to carry out the purposes of this section.

§ 987.8 Ability of defendant to pay cost of legal assistance; determination by court; notice; order; execution; petition to modify or vacate

(a) In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided. At a hearing, the defendant shall be entitled to have, but shall not be limited to, the opportunity to be heard in person, to present witnesses and other documentary evidence,

and to confront and cross-examine adverse witnesses; disclosure of the evidence against the defendant, and a written statement of the findings of the court. If the court determines that the defendant has the present ability to pay all or part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order to pay all or part of the costs shall not be enforced by contempt.

(b) Prior to the furnishing of counsel or legal assistance by the court, the court shall give notice to the defendant that upon the conclusion of the criminal proceedings in the trial court, the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has such present ability, the court shall order him to pay all or part of such cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to execution.

(c) Definitions

(1) The term "legal assistance provided" means legal counsel and supportive services including, but not limited to, medical and psychiatric examinations,

invetigative services, expert testimony and any other form of services provided to assist the defendant in the preparation and presentation of the defendant's case.

(2) The term "ability to pay" means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided, and shall include, but not be limited to the defendant's:

(i) Present financial position;

(ii) Reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purpose of determining reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the cost of his defense.

(iii) Likelihood that the defendant shall be able to obtain employment within a six month period from the date of the hearing.

(iv) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided.

(d) At any time during the pendency of the judgment rendered according to the terms of this section, a defendant

against whom a judgment has been rendered may petition the rendering court to modify or vacate its previous judgment on the grounds of a change in circumstances with regard to the defendant's ability to pay the judgment. The court shall advise the defendant of this right at the time of rendering the judgment.

§ 987.9 Investigators, experts and others; payment for defense of indigent defendant in capital cases; application

In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation and presentation of the defense. The fact that such an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

APPENDIX D

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No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

SUPREME COURT
FILED
FEB 23 1982
LAURENCE P. GILL, Clerk
Deputy

FEB 23 P.3:04

PETITION FOR REHEARING

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No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	)

PETITION FOR REHEARING

TO: THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

According to the Opinion of the Court in this case filed February 8, 1982, on at least five separate prior occasions the applications of petitioner, Maurice John Keenan, to have court-appointed co-counsel have been heard and considered by courts of this State. The People, plaintiff in the proceedings below and real party in interest in this action, having yet to be heard, file this Petition for Rehearing pursuant to Rule 27 of the California Rules of Court, and contend as follows:

ARGUMENT

I

AS CONSTRUED BY THIS COURT PENAL CODE SECTION 987.9 VIOLATES THE PEOPLE'S RIGHTS TO DUE PROCESS OF LAW AND FREEDOM OF SPEECH.

The facts of this case as revealed by this Court's opinion indicate that Maurice Keenan, a capitally charged defendant, made a confidential application for funds to pay for investigators and experts as permitted by Penal Code section 987.9. In conjunction with these requests, he further sought funds to pay for a second attorney. The People were given no notice of Keenan's applications. Keenan was given a total of $23,000 to pay for experts and investigators, but his request for funds to pay a second attorney was denied by respondent superior court. Keenan made two more requests for funds for co-counsel, which were again denied. The People again received no notice of the requests or their denials.

Keenan pursued his request for funds to pay co-counsel by filing a secret writ seeking pretrial review of the superior court's denials before the Court of Appeal. No service of this petition was effected upon the People. The Court of Appeal covertly denied Keenan's application for extraordinary relief, issuing a written opinion authored by Justice Rouse. Neither the written opinion nor the votes of the two associate justices on the Court of Appeal has been made public. Finally, Keenan sought hearing in

this Court. Again, there was no notice of Keenan's petition served upon the People. Hearing was clandestinely granted in this Court without notification to the People. At some point, the San Francisco City Attorney was appointed to represent the respondent superior court. The People, as real party in interest, were precluded from filing a brief owing to the absence of notification that the matter was pending.[1/] Oral argument was scheduled for Noverber 30, 1981. Again, no notice was sent to the People. Oral argument was then heard in public session. On February 8, 1982, this Court issued its opinion granting Keenan a second court-appointed attorney. Except for the opinion of this Court, the record of these proceedings has been sealed from public view.

In short, petitioner has been granted funds for the appointment of co-counsel to assist in his defense, based on secret applications which were heard clandestinely by the courts in in camera proceedings, without affording the People notice or opportunity to be heard on the motions. In the absence of any meaningful opportunity to hear from the People, this Court has created a rule of statewide

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1/ These were not the first occasions on which Keenan and his attorney have attempted to preclude representation by the People's elected officials. In People v. Keenan, 1/Crim. No. 20868, presently pending before Division Four of the First Appellate District, Keenan moved on March 6, 1981, to have the Attorney General recused from prosecuting his appeal. The court denied this motion on April 10, 1981, after receipt of Opposition from the People.

impact on the assignment of counsel in death penalty cases. The People, as real party in interest, submit these proceedings were violative of their right to due process of law.

The cornerstone of the Anglo-American system of justice is the adversary system. The United States Constitution recognizes this system as the proper method for resolving questions pertaining to the guilt or innocence of an accused criminal defendant. United States v. Singer (1965) 380 U.S. 24, 36. This system benefits the courts by allowing opposing positions to be heard. In this case the adversary system has been by-passed in favor of unilateral, one-sided representation by one party.

The Government, as a party litigant to criminal proceedings, is entitled to due process of law. For "justice, though due to the accused is due to the accuser also. The concept of fairness must be be strained till it is narrowed to a filament. We are to keep the balance true." Snyder v. Massachusetts (1933) 291 U.S. 97, 122. Society has a right to a fair trial to redress wrongs against it, and "[t]he people of a State are also entitled to due process of law." Stein v. New York (1952) 346 U.S. 156, 196-197; see Fay v. New York (1946) 332 U.S. 261, 288-289; Sun Company of San Bernardino v. Superior Court (1973) 29 Cal.App.3d 815, 822.

The two basic requisites of procedural due process are notice and an opportunity to be heard. Fuentes

v. Shevin (1972) 407 U.S. 67, 80; Lambert v. California (1957) 355 U.S. 225, 228. "This right to be heard has little meaning or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314.

Here, the People have received neither notice of petitioner's repeated requests for funds to employ co-counsel, nor have they been given an opportunity to be heard on petitioner's applications. Yet, the People of this State unquestionably have an interest in seeing that all criminal defendants receive adequate representation by court-appointed counsel. The costs to society of failing to afford a criminal defendant a fair trial because of inadequate representation by counsel are indeed high. Reversals of criminal convictions inevitably mean the delay of justice both for society and the accused. Victims of crime are often required to relive again painful memories through the medium of cross-examination at retrials. Reprosecution of some cases becomes impossible when witnesses or evidence disappear, and in other cases reprosecution is more difficult because old evidence must be unearthed. See Nebraska Press Asso. v. Stuart (1976) 427 U.S. 539, 555. The People, therefore, are directly affected by the criminal justice system's mistakes when defense counsel is found to have rendered ineffective legal assistance to a criminally accused defendant. It is in this sense that

the People's interests lie in the courts being given accurate information on which they base their decisions and assuring that court-appointed counsel are competent to represent accused criminal defendants adequately.

But, under this Court's ruling appointments of counsel can now be accomplished under a shroud of secrecy. No one would even know that funds had been appropriated to employ co-counsel because the request for such funds would be deemed confidential. We would not even know whether the person selected as co-counsel was a member of the State Bar. The assignment of counsel in death penalty cases is, we submit, too important to permit one-sided applications to be heard behind closed doors, with no opportunity for a response and absent any public accountability for either the superior court's decision to appropriate funds or defense counsel's selection of co-counsel. We cannot believe that the Legislature could have possibly intended this unprecedented result when it enacted Penal Code section 987.9.

Almost a century ago this Court declared in a case involving suppression of public information about a court proceeding:

> "In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility

of wrong and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions in which the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency are regarded as essential to the public welfare. Therefore, when it is claimed that this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the law-making power, or the right to exercise the authority claimed must be necessarily implied as essential to the execution of the powers expressly conferred."

In re Shortridge (1893) 99 Cal. 526, 530-531.

More recently, this Court observed our Legislature's policy regarding secrecy in government. "The Legislature has said, 'It is the policy of the State of California that public records and documents be open for public inspection in order to prevent secrecy in governmental affairs. . . .'" Bruce v. Gregory, supra, 65 Cal.2d at 677. "Access to and inspection of public records is a fundamental right of citizenship, existing at common law. [Citations

omitted.] It can be abridged or circumscribed only for the most compelling public purpose, and then only by an officer or agency acting pursuant to express authority." (Id. at 679; Mosk, J. dissenting). As Justice Frankfurter stated in his concurring opinion in Joint Anti-Fascist Refugee Com. v. McGrath (1951) 341 U.S. 123-171: "Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of rightness." "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . ." Fuentes v. Shevin, supra, 407 U.S. at 81.

We see no reason in this case (and this Court's opinion provides none) for hiding the fact of co-counsel's requested appointment.[2/] Under the most extravagant reading of the holdings in Allen v. Superior Court (1976) 18 Cal.3d 520, and Prudhomme v. Superior Court (1970) 2 Cal.3d 320, there exists no basis for concluding that knowing of a defendant's request for appointment of co-counsel would in any way violate the defendant's privilege against self-incrimination. The prosecution's burden of proof could not possibly be lightened because it knew that funds for more than one attorney was being requested by the defense. A lawyer, after all, is not like a defense witness, defense expert, or defense investigator. The lawyer's presence will

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2/ As will be demonstrated in Argument II, Penal Code section 987.9 provides no authorization for keeping this fact a secret.

be there for all to see. Unless we accept the notion that the element of surprise at trial, when two defense attorneys suddenly appear at counsel table, is a legitimate tool of a criminal defendant, we see no ground for keeping secret the fact of counsel's request for the appointment of co-counsel.

Allowing for notice and the opportunity to be heard would, on the other hand, forestall any possible accusations of partiality, favoritism or abuse of judicial power. And perhaps most importantly, public disclosure of the request would avoid any appearance of impropriety. Cf. People v. Superior Court (Greer) (1979) 19 Cal.3d 255, 267-268. It is the very secrecy of this proceeding, as contrasted with the court's business generally being conducted in public, which raises the question of propriety. See In re Oliver (1948) 333 U.S. 257, 273. The public's right to honest and impartial government (County of Nevada v. MacMillen (1974) 11 Cal.3d 662, 672) is, we submit, seriously compromised by the secret appointment of counsel now permitted under this Court's ruling.

Moreover, the delicacy surrounding a court's receipt of ex parte communications is reflected by this State's Code of Judicial Conduct. Canon 3(A)(4) provides in pertinent part that "except as authorized by law, [a judge should] neither initiate nor consider ex parte or other communications concerning a pending proceeding." It is our position that no legal authorization has been

given to the judges of this State to hear ex parte requests for appointment of counsel. Certainly Penal Code section 987.9, which deals with confidential requests for investigative funds, provides no express authority to secretly request funds for the appointment of co-counsel. Stated simply, the public had a right to know that petitioner was requesting funds for two attorneys to act as his legal representatives. And, it also had the right to know what the respondent court's ruling was on the matter. 3/

The Colorado Supreme Court has recognized that serious questions of constitutional law involving freedom of the press and separation of governmental powers are raised by legislation denying the public access to judicial records. Times-Call Publishing Co. v. Wingfield (1966) 159 Colo. 172, 410 P.2d 511, 513. Here, the same questions arise by virtue of this Court's interpretation of Penal Code section 987.9, permitting secret requests for appointments of counsel, with no opportunity for public response or access to the record which is created. When

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3/ Real party in interest notes that this Court's opinion purports to state the People's position in this case (Slip Opinion, at p. 12 fn. 12). This seems rather strange since until this time the People had taken no position in the case, owing to the fact that there was no notice given of its pendancy, and because of the absence of any prior opportunity to be heard. Further, it is sadly ironic that the Court points to the assisting function of the Attorney General's office in the pretrial review process (ibid.) when by virtue of the record in this case having been ordered sealed, the Attorney General has been denied the opportunity to assist the local prosecutor.

construing a legislative enactment, however, it is the duty of the courts to "adopt an interpretation that, consistent with statutory language and purpose, eliminates doubts as to the provision's constitutionality." People v. Davis, supra, 29 Cal.3d at 829; In re Kay (1970) 1 Cal.3d 930, 942. Legislation should thus be construed, where reasonably possible, so as to preserve its constitutionality. Department of Corrections v. Workers' Comp. App. Bd. (1979) 23 Cal.3d 197, 207; California Housing Finance Agency v. Elliott (1976) 17 Cal.3d 575, 594. The courts must be especially sensitive to assure that constitutionally protected freedoms of speech and the press are preserved. As both the United States Supreme Court and this Court have observed in the context of ex parte temporary restraining orders, issued without notice to the opposing party, "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and give them an opportunity to participate." Carroll v. Princess Anne (1968) 393 U.S. 175, 180; Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal.3d 294, 311. Although prior restraints on presumptively protected First Amendment freedoms are not unconstitutional per se, in order to avoid constitutional infirmity such restraints must occur "under procedural safeguards designed to obviate the dangers of a censorship system." Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 559;

People ex rel. Busch v. Projection Room Theater (1976) 17 Cal.3d 42, 57.

The Court's opinion in this case, however, fails to consider, much less resolve, the constitutional problems inherent in allowing the courts of this State to appropriate funds to employ counsel in death penalty cases by means of "confidential," ex parte proceedings. Obviously, the prosecutor might never learn of counsel's requested appointment because he has never been given formal notice. Just as clearly, the public and the press would never be alerted because the Court's decision is reached in secret. Lest magisterial secrecy be allowed to sweep away the government of laws (see People v. Beasley (1970) 5 Cal.App.3d 617, 637), this Court must require public disclosure of any defense requests for funds to pay co-counsel, public disclosure of the superior court's ruling thereon, and public disclosure of co-counsel's identity. This Court cites no authority beyond its interpretation of Penal Code section 987.9 for the proposition that the public may be denied access to any hearing involving the appointment of counsel and the resultant prior restraint on the public's First Amendment rights.[4/]

4/ Government Code section 6200 would seem, on its face, to forbid the secreting of any judicial record. This statute provides in pertinent part that "'Every officer having the custody of . . . any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of . . . wilfully destroying, mutilating, defacing, altering or falsi-

By virtue of this Court's construction of Penal Code section 987.9, real party in interest submits that a statutory classification has been created, allowing death penalty defendants to secretly move for funds to pay co-counsel. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate those interests." Zablocki v. Redhail (1978) 434 U.S. 374, 388. The public unquestionably has a right, which we submit to be a fundamental one, to know about and discuss all judicial proceedings, unless there are articulated, substantial and legitimate reasons for denying the public's right of access. Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555, 591; see In re Shortridge, supra, 99 Cal. at 531. Dating from before the time reliable historical records were kept, the public has always been entitled to the right of access to criminal proceedings. Richmond Newspapers, Inc. v. Virginia, supra, 448 U.S. at 564-565. "Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are

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(Footnote 4/ continued)

fying, removing or secreting the whole or any part of such record, . . . paper, or proceeding, or who permits any other person to do so,' is punishable by a prison term of up to 14 years." Loder v. Municipal Court (1976) 17 Cal.3d 859, 863 (emphasis added).

conducted; . . . ." Id. at 575. The explicit, guaranteed rights to speak and to publish concerning what takes place at a criminal trial would be rendered meaningless if access to observe trial proceedings were, as here, arbitrarily foreclosed. Id. at 576-577. Absent an overriding interest on a part of a criminal defendant in protecting the right to a fair trial, the public is presumptively entitled to that right of access. Id. at 581. We submit that no compelling state interest even remotely justifies keeping the fact of counsel's request for funds to employ co-counsel a secret. "The fact that a lawyer is appearing in a representative capacity must always be out in the open." Wise, Legal Ethics (1970) at p. 334.

The Legislature has selectively limited those court proceedings to which the public is denied access. E.g., Cal. Pen. Code § 868; Cal. Welf. & Inst. Code § 676; see also, San Jose Mercury News v. Municipal Court (Garza) (1982) 30 Cal.3d 498. Even in those situations, however, the People, as the party litigant, have not been excluded from the proceedings as was the case here. To reiterate, we submit that there is nothing to balance against the public's right to know that money for a second attorney is being sought from the judiciary. No conceivable, legitimate reason for keeping either the fact of this request or the superior court's ruling on the matter a secret has been shown. Because Penal Code section 987.9, as construed by the opinion of this Court, serves to bar the public as well

as the People's legal representatives from such judicial proceedings, real party in interest maintains that its constitutionally protected rights have been infringed.

II

PENAL CODE SECTION 987.9 DOES NOT AUTHORIZE PAYMENT FOR COUNSEL IN DEATH PENALTY CASES.

Penal Code section 987.9 permits confidential applications in death penalty cases for funds to employ "experts, investigators and others . . . ." This Court now holds that this statute authorizes confidential requests for funds to pay for a second defense counsel. This reading of section 987.9 cannot withstand scrutiny.

What is now Penal Code section 987.9 appears in the 1977 Statutes of the California Legislature at Chapter 1048. This statute was first introduced into the Assembly by Assemblyman Goggin on March 15, 1977, as Assembly Bill 938.[5/] The bill originally amended sections 859b and 861 of the Penal Code, while adding new section 991 to the Penal Code (Exhibit A; Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Assembly, March 15, 1977, at p. 927).

On May 9, 1977, Assemblyman Goggin presented certain amendments which were read and adopted. Reference to sections 859b and 861 of the Penal Code were stricken and in their place was added a reference to "Article 13

5/ For the convenience of the Court, we have appended hereto, as Exhibit A, copies of Assembly Bill No. 938 and its amendments through the legislative process. We request judicial notice be taken of this bill. Cal. Evid. Code §§ 452; 459.

(commencing with Section 6191), to Chapter 4 of Division 3 of the Business and Professions Code, and amending section 987 of, and adding section 987.9 to, the Penal Code, relating to attorneys, and making an appropriation therefor" (Exhibit A; Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Assembly on May 9, 1977, at p. 2854). As amended, this bill expressly provided under section 987(a) for the assignment of counsel in capital cases; required the State Bar to prepare a list of qualified criminal defense attorneys to serve in capital cases; limited superior court appointments of counsel in such cases to those appearing on the State Bar list; provided for payment of investigators, experts and others under section 987.9; and appropriated $1,100,000 from the General Fund for these purposes (ibid.).

On May 19, 1977, the bill was further amended in the Assembly when the provisions dealing with the appointment of counsel and adding section 6191 to the Business and Professions Code were deleted. Provision for the appointment of counsel in death penalty cases was accordingly dropped from the bill, leaving only the provision for investigation funds. The amount of money appropriated from the General Fund was reduced by $100,000, thereby authorizing a sum of $1,000,000. The Legislative Counsel's Digest for this amended version of Assembly Bill No. 938, reads as follows:

"Existing law provides for the assign-

ment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.

"This bill would provide for payment of investigators, experts and others for the preparation or presentation of the defense of indigent defendants in capital cases." (Exhibit A.)

Thereafter, Assembly Bill No. 938 was described in the Assembly Journal as "[a]n act to add Section 987.9 to, the Penal Code, relating to investigation funds, and making an appropriation therefor." (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Assembly on June 9, 1977, at p. 4698; id. on June 10, 1977, at p. 4813; id. on September 8, 1977, at p. 9196; id. on September 9, 1977, at pp. 9213-9214; id. on September 12, 1977, at p. 9421.)

Assembly Bill No. 938 was amended in the Senate on August 11, 1977,[6/] to make it an urgency measure taking effect only if that year's Death Penalty Law (Senate Bill 155) was enacted. The confidentiality aspects of defense applications for funds to pay investigators, experts and others were added at that time, as was the requirement that the ruling on the defense request be made in an in-camera hearing by an anonymous judge other than the trial

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6/ The principal co-author in the Senate was Senator Deukmejian. Assemblyman Wornum's name was added to that of Assemblyman Goggin's as the bill's introducer.

judge. In other words, the confidential nature of defense requests was added to Assembly Bill No. 938 only after the bill's provision for counsel in death penalty cases had been deleted.

On September 8, 1977, the bill, as amended, was passed by the Senate on motion of Senator Deukmejian (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Senate on September 8, 1977, at pp. 6565, 6574). As was true in the Assembly after provisions for appointing counsel were dropped from the bill, Assembly Bill No. 938 was consistently referred to in the Senate as an act "relating to investigation funds, . . ." (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Senate on June 10, 1977, at p. 3317; id. on August 11, 1977, at p. 5029; id. on September 2, 1977, at p. 6143).

Assembly Bill No. 938, as amended, was passed by the Senate on September 8, 1977 (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Senate on September 8, 1977, at p. 6574). The following day, September 9, 1977, the bill was passed by the Assembly, with that body's acceptance of the Senate's amendments (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Assembly on September 9, 1977, at pp. 9212-9213). The Governor signed it into law on September 24, 1977.

This history of Assembly Bill No. 938 leaves no room for doubt concerning the Legislature's intent in 1977, when it enacted what is now Penal Code section 987.9 into

law. A new provision for appointment of counsel in death penalty cases was, in no uncertain terms, rejected by the Legislature. As the Legislative Counsel's Digest states, existing law provided for counsel's appointment in death penalty cases. Assembly Bill No. 938, as amended, had nothing to do with either appointment or payment of counsel in such cases, but rather related specifically to the appropriation of funds to pay for investigative services. There is nothing equivocal about the Legislature's distinction between the provisions for appointing counsel on the one hand, and providing funds for investigation on the other. The history of this statute clearly reveals a specific and limited legislative intent, unrelated to any desire to provide for assignment of counsel in death penalty cases. Since the Legislature explicitly rejected any provision for appointing counsel in such cases, and made not the slightest suggestion that it intended the payment of counsel under section 987.9, this Court should not have inserted counsel into that statute.

"As stated in Madrid v. Justice Court (1975) 52 Cal.App.3d 819, 825: '"The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision."'" California Costal Com. v. Quanta Investment

Corp. (1980) 113 Cal.App.3d 579, 601-602.

Clearly, the Legislature enacted Penal Code section 987.9 not as a means of providing funds to pay for additional counsel in death penalty cases, but solely as a method to provide funds for investigation services. 7/ Cf. People v. Davis (1981) 29 Cal.3d 814, 829-830. The conclusion that section 987.9 was not intended to apply to funds for counsel is further buttressed by a brief examination of the other subsections of Penal Code section

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7/ People v. Jackson (1980) 28 Cal.3d 204, 287, provides no support for this Court's conclusion that Penal Code section 987.9 empowered the respondent superior court to secretly appropriate funds for a second defense attorney. In holding that equal protection principles did not mandate the appointment of two attorneys in death penalty cases, Jackson stated:

> "Accordingly, equal protection demands are satisfied by permitting the trial court, in its discretion, to appoint additional counsel at public expense if the circumstances in a particular case appear to require such an appointment. (See § 987.9, authorizing payment for 'investigators, experts and others for the preparation or presentation of the defense.')"

The "See" citation to section 987.9 can hardly be said to constitute an authoritative discussion on the question of whether that section applies to funds for co-counsel's appointment. "Incidental statements or conclusions not necessary to the decision are not to be regarded as authority." Simmons v. Superior Court (1959) 52 Cal.2d 373, 378. "It is axiomatic that judicial statements of law on points not 'raised or considered' or 'disputed or argued' lack precedential or authoritative value. 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 699, p. 4615.)" Malone v. Western Conf. of Teamsters Pension Trust (1980) 110 Cal. App.3d 538, 549.

Jackson, therefore, is but little help on the matter decided here, since section 987.9 was cited without discussion or apparent argument.

987, which expressly provide for payment of counsel. Pursuant to section 987.2(a), court-appointed counsel in all cases (with an exception under section 987.2(c) for those public defenders representing inmates of the Department of Corrections), are paid out of the county general fund. Section 987.6 provides State reimbursement to counties, in an amount not exceeding 10 percent, for funds expended by the counties in providing counsel for persons charged with violating State criminal law. This Court's opinion, however, would now require the State to pay for all the expenses of co-counsel from the funds, which the Legislature has appropriated for investigators, experts and others. Since State payment for costs of counsel, in an amount not to exceed 10 percent, was already covered by existing law, one could not reasonably assume that the Legislature was knowingly undertaking the State's full payment of co-counsel in all death penalty cases. A matter of this fiscal magnitude could not merely have been overlooked by the Legislature.

Since the legislation authorizing trial court funding of investigations and experts mandates a higher level of service on local government, the Legislature was required to provide funding to reimburse those costs. Section 2231, Revenue and Taxation Code. The Legislature did so by appropriating $1,000,000 as part of Assembly Bill No. 938 and has continued to fund these services by providing an annual appropriation of $1,000,000 in later

budget years. California Stats. 1979, Chapter 259, Budget Act Item 415, California Stats. 1980, Chapter 510, Budget Act Item 467. As of July 1, 1981, the State has disbursed a total of about $2,630,000. The amounts appropriated make it clear that the Legislature intended 987.9 to apply only to investigation expert costs, rather than to include costs of a second appointed counsel. A quick check of costs for appointed defense trial counsel reveals that a conservative estimate of the average cost would be in excess of $25,000.[8/] Los Angeles County alone has prosecuted more than 150 capital cases since restoration of capital punishment in California. That cost alone would exceed $4,000,000. If the Legislature had intended to include the appointment of additional counsel within 987.9, the appropriations would have been increased by several million dollars.

Even assuming, however, that the Legislature had not rejected a provision for appointing counsel in death penalty cases when it enacted Penal Code section 987.9, ordinary rules of statutory construction would forbid this Court's inclusion of second counsel within the language of that statute. Surely, a defense counsel cannot be deemed to be an expert or an investigator. All that then remains is the pronoun "others." But,

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8/ For example, the cost of appointed defense trial counsel in several cases before this Court is as follows: People v. Harris, Crim. No. 20888 - $43,957; People v. Bittaker, Crim. No. 21942 - $41,800; People v. Hamilton, Crim. No. 21958 - $86, 903; People v. Kimble, Crim. No. 21962 - $22,400; People v. Myers, Crim. No. 21991 - $32,600.

"As stated in People v. McKean (1925) 76 Cal. App. 114, 119: '"By the rule of construction known as 'ejusdem generis,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The word 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind or character."' (Second italics added.)" California Coastal Com. v. Quanta Investment Corp., 113 Cal.App.3d, supra, at 607; see Pasadena University v. Los Angeles Co. (1923) 190 Cal. 786, 790; Scally v. Pacific Gas & Electric Co. (1972) 23 Cal.App.2d 806, 819.

Within common understanding, co-counsel is not

of the same general class or category as experts and investigators. Had the Legislature intended the word "others" to include counsel, it would have been easy to say so. The failure of the Legislature to accomplish with precision the very result urged by petitioner and adopted by this Court demonstrates the fundamental weakness of that position. People v. Caudillo (1978) 21 Cal.3d 562, 586. While words may be elastic and capable of being stretched to fit a desired meaning, making counsel into an "other" exceeds the bounds of reasoned interpretation. Words within a legislative enactment should not be interpreted so as to "carry the operation of the enactment far beyond the legislative intent and thereby make its provisions apply to transactions never contemplated by the legislative body . . . ." Bruce v. Gregory (1967) 65 Cal.2d 666, 674; People v. Davenport (1939) 13 Cal.2d 681, 695. It denigrates the role which defense counsel plays in our criminal justice system to label co-counsel as an "other" in order to bring that attorney within the language of Penal Code section 987.9.

Moreover, this Court should consider the practical consequences of permitting secret requests for funds with which to employ co-counsel. Unlike other statutes such as Penal Code sections 859b and 987.2, which empower a trial court to appoint counsel, section 987.9 gives the assigned superior court judge no power to select, much less even to reject, whichever "experts, investigators or others . . . ."

the defense attorney chooses. By the provisions of this statute, the court is only authorized to appropriate funds to pay for those persons' services. Does this Court's opinion now portend the secret appointment of defense counsel in capital cases, absent the trial court having any choice in the matter? If so, we submit it is inviting cronyism or defense counsel's selection of incompetent co-counsel. It is, we submit, manifest that section 987.9, with its provision for confidential applications to an anonymous judge other than the trial judge, was never intended by the Legislature to apply to appointments of counsel, which by law are the statutory duties of the magistrate on arraignment in open court (Pen. Code §§ 859, 987), or within the inherent jurisdiction of the trial court.

In summary, real party in interest believes that this Court erred when it decided that Penal Code section 987.9 applies to the appointment of defense counsel in capital cases. As matters of legislative history, statutory construction, and practical application, the conclusion that this statute authorizes the confidential payment of funds for a second attorney is plainly wrong.

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III

THE SUPREME COURT, COURT OF APPEALS AND SUPERIOR COURT ACTED IN EXCESS OF THEIR JURISDICTION WHEN THEY HEARD PETITIONER'S EX PARTE APPLICATIONS FOR FUNDS TO EMPLOY CO-COUNSEL.

As has been shown, Penal Code section 987.9, as well as independent constitutional guarantees, do not permit ex parte proceedings on the appointment of counsel. Because that statute is inapplicable to counsel's appointment, we contend that respondent superior court acted in excess of its jurisdiction when it heard petitioner's secret application.

In Safer v. Superior Court (1975) 15 Cal.3d 230, this Court considered the propriety of the Ventura County District Attorney's intervention into a civil suit. The prosecutor there attempted to charge certain persons with contempt of court under Code of Civil Procedure, section 1209, rather than as misdemeanors under Penal Code section 166, subdivision 4. Id. at 233-234. The latter statute afforded the alleged contemnors the right to a jury trial, while the former did not. Id. at 234; 239. After examining several specific statutes under which the district attorney could have properly exercised the power of his office (id. at 236-238), this Court concluded that the Legislature had not authorized the district attorney to appear in private contempt proceedings. Id. at 238. The Court found it significant that when the Legislature granted the district attorney the power to appear in civil

proceedings, that power was specifically delegated. Absent any such specific authority, the district attorney was not authorized to intervene and the proceedings could be restrained by a writ of prohibition. Thus, this Court stated:

> "We find further indication that the district attorney's authority does not embrace the circumstances of this case in the Legislature's clear demonstration that it knows how to grant him such power when it wishes to do so. . . . Thus the Legislature, when it desired to authorize a district attorney's intervention in contempt proceedings stemming from private litigation to enforce an order, had no difficulty in expressing itself; its articulation of specific statutory authorization in that situation points to the absence of such authority in the instant case." Id. at 237-238.

Here, of course, there exists a similar absence of any specific statutory authority permitting counsel in a death penalty case to move ex parte for the appropriation of funds to employ a second attorney. The Legislature, when it desired to give death penalty defendants the right to appointment of counsel, had no difficulty expressing itself. Pen. Code §§ 859b, 987.2. Hearings

under the latter two Penal Code sections would occur in open court where both the public and their legal representatives would have knowledge of the requested appointment of co-counsel.

Instead of proceeding under these specific provisions of the Penal Code, petitioner moved pursuant to section 987.9, which allows confidential applications for funds to employ investigators, experts and others, thereby depriving the People of their due process rights to notice and an opportunity to be heard, and their First Amendment rights of free access to court proceedings. As in Safer, we submit that the respondent superior court acted in excess of its jurisdiction, in the broad sense of this word, when it heard petitioner's ex parte applications. "'It seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.'" Id. at 242.

In the present case, the Superior Court in and for the City and County of San Francisco, by permitting petitioner's defense counsel to seek funds for appointing co-counsel under Penal Code section 987.9, contrary to the statutorily authorized procedures for such appointments, failed regularly to conduct its proceedings. In so doing, respondent superior court exceeded its jurisdiction. Ibid. Had real party in interest been advised of respondent

superior court's unauthorized hearing of petitioner's motion, we would have moved to prohibit such unlawful proceedings. But, since respondent court correctly denied the petition, though not for this reason, its determination must be sustained. Respondent superior court lacked legal authorization covertly to appropriate funds for co-counsel under Penal Code section 987.9, and both this Court and the Court of Appeals similarly lack jurisdiction to order the secret payment of State funds for a second court-appointed attorney. The Legislature has not authorized the courts to hold the kind of covert hearings which have occurred in this case.

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IV

DUE PROCESS OF LAW DOES NOT REQUIRE THE APPOINTMENT OF TWO ATTORNEYS TO REPRESENT PETITIONER.

This court has previously held that:

"A defendant's right to court appointed counsel does not include the right to require the court to appoint more than one counsel, unless the record clearly shows that the first appointed counsel is not adequately representing him." In re Banks (1971) 4 Cal.3d 337, 342; People v. Williams (1970) 2 Cal.3d 894, 904; see People v. Smith (1968) 69 Cal.2d 751, 758-759.

Federal law is in accord. The federal appellate courts have recognized that there is no fundamental constitutional right to representation by more than one attorney in death penalty cases. United States v. Blankenship (4th Cir. 1976) 548 F.2d 1118, 1121, cert. den. 425 U.S. 978; United States v. Williams (4th Cir. 1976) 544 F.2d 1215, 1218; Crum v. Hunter (10th Cir. 1945) 151 F.2d 359, 361, cert. den. 328 U.S. 850 (1946). Rather, such right has been granted by statute. 18 U.S.C. § 3005. This statutory command has been held to supercede the district court's normal exercise of discretion in determining whether one appointed attorney will or can adequately and effectively represent the accused. United States v.

Blankenship, supra, 548 F.2d at 1121.

Nevertheless, this Court now creates a presumption that in cases of "genuine need" a second attorney is required in death penalty cases. The foundation for erecting this presumption is the Legislature's intent when it enacted section 987.9 to provide "a complete and full defense" in a capital case. The problem with this judicially created presumption, however, lies in its uncritical reliance on section 987.9 as a basis for appropriating funds to pay for co-counsel. Lacking the foundation provided by section 987.9, the presumption lacks any precedential support and must, like a house built on quicksand, fall. As we have shown, it is inconceivable that the Legislature ever intended section 987.9 to apply to assignment of, or payment for, counsel. This Court's presumption, therefore, cannot withstand the test of critical analysis.

If any presumption exists, it is that attorneys licensed by the State Bar are, as a matter of law, presumed competent to appear in all types of actions, including death penalty cases. In Smith v. Superior Court (1968) 68 Cal.2d 547, this Court considered the question whether a trial judge is empowered to remove a court-appointed attorney when the court believes that the attorney is incompetent because of ignorance of the law to try a particular case. In that instance, it was a death penalty case. The Court, per Justice Mosk, concluded that the

trial judge lacked such power, observing that "the admission of an attorney to the bar establishes that the State deems him competent to undertake the practice of law before all our courts, in all types of actions." Id. at 559. It should, accordingly, be presumed in this case that Mr. Schwartzbach, alone, is competent to represent petitioner.

Heretofore, the decision as to whether the court should appoint more than one counsel has been vested in the sound discretion of the trial courts. People v. Jackson, supra, 28 Cal.3d at 286-287. In the analogous circumstance of appointing substitute counsel, this Court has declared that there is a "field of discretion for the [trial] court." People v. Marsden (1970) 2 Cal.3d 118, 123. A "heavy burden" had been imposed in order to state a claimful relief cognizable on mandate. Drumgo v. Superior Court (1973) 8 Cal.3d 930, 933. Standards for that discretionary decision have been enunciated:

> "'The word [discretion] imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped

by prejudice nor moved by any kind of influence save alone the overwhelming passion to that which is just.'"

People v. Russel (1968) 69 Cal.2d 187, 194.

For all practical purposes, as a result of this Court's opinion in this case, the matter of appointing counsel in death penalty cases has been removed from the courts' discretion. Discretion now resides with defense counsel, such that any death penalty defendant's lawyer who wants a second lawyer's assistance will inevitably be able to get one under this Court's present ruling.

Still, one searches in vain for the source of this right. Neither constitutionally nor by statute have criminal defendants been granted the right to have more than one appointed attorney. The California Constitution, under article I, section 15, affords all criminal defendants the right "to have the assistance of counsel for [their] defense, ..." Penal Code section 686, which implements this constitutional guarantee, entitles a defendant in a capital case to "appear and defend in person and with counsel . . . at all stages of the preliminary and trial proceedings." Pursuant to Penal Code sections 859 and 987(b), in a capital case the defendant "must be represented by counsel. . . ." None of these provisions contain the slightest clue that a defendant in a capital case is entitled to have more than one attorney act as a legal representative. If funds for co-counsel are presumptively

to be appropriated in death penalty cases, then we believe the presumption to be a matter for the Legislature and not the courts to implement. See People v. Collie (1981) 30 Cal.3d 43, 56.

Due process of law, as we comprehend it, does not necessarily require representation by more than one attorney. The substance of due process may be denied even though the accused is represented by a coterie of counsel, yet the accused may have it when he is represented by a competent attorney. Unless present counsel's representation is held to be constitutionally inadequate, there is no justification for the appointment of additional counsel in this case.

Lacking from the beginning any opportunity to participate in these proceedings, and without access to the record in this case, which has been ordered sealed, the People are necessarily at a disadvantage in responding to the Court's reasons for concluding that second counsel is required here. Had we been given the chance to be heard before the courts, however, it would have been our position that this case is neither more factually nor legally complex than the run-of-the-mill robbery which results in a murder. As described in another context, it is a rather "'ordinary' homicide such as all too often occurs in the course of a robbery. . . ." Frazier v. Superior Court (1971) 5 Cal.3d 287, 295. Furthermore, we would have disputed the need to have a lawyer interview

each of the alleged 120 witnesses, which we suspect is an exaggerated figure in any event. Counsel has been given investigative services and should not be expected to waste both time and money by personally interviewing every person who has ever had any connection with his client, no matter how remote that connection. "Extraordinary preparation" is what is expected of any defense counsel, and should not be an excuse for seeking two lawyers. Keenan's other criminal misdeeds, moreover, involve in at least four cases, alleged crimes of escape, attempted escape and assault on an inmate with a prison-made weapon, all of which occurred after the charged homicide. He should not be rewarded because he has made his case more complicated by committing more crimes. Finally, we would have argued that even under this Court's newly created standard of "genuine need," the fact that present counsel would find a second attorney's assistance "useful" in preparing pretrial writs, does not establish the need for such assistance. Petitioner can hardly complain of any loss because of an inability to have the appellate courts hear his pretrial writs, where he has filed, to our knowledge, at least seven such petitions resulting in the delay of his trial for over two and one-half years. In all these respects, real party in interest would have contended that two attorneys are not necessary in this case.

Real party in interest submits that the decision whether two, or more, attorneys are required for effective

assistance in a given case should remain subject to the trial court's sound discretion. Nothing magic inheres in the number two. It could be argued that three attorneys would be better than two, not only for their superior brain power, but also because any conflicts among them could be settled by majority vote. Nor do we believe that having two, or three, or even four lawyers present will deter the tide of incompetence of counsel claims. The contrary seems just as likely to occur as each attorney tries to shift the blame of the loss on the other, and the accused seeks to play both ends against the middle. We can envision the addition of more defense lawyers becoming like more rocks thrown into a pond to muddy the waters.

This Court's opinion fails to address the question of its retroactive effect. Because the opinion refers to the respondent superior court's past error in failing to apply the newly created presumption when a showing of "genuine need" is satisfied, it undoubtedly will be argued that the Court's ruling is to be given retroactive effect. In that event, we can anticipate claims in death penalty cases which are pending on appeal, and in the trial courts, of a presumed need for two attorneys. On the other hand, the Court has created a new rule of law which should not apply to cases already final or in the process of appellate litigation. The matter of retroactivity, too, must be addressed.

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CONCLUSION

This Court's opinion expressly recognizes that Keenan has no absolute right to representation by more than one attorney (Slip Opinion, at p. 6). What we do challenge are petitioner's need for two lawyers in the circumstances of this case; the propriety of covert appropriations of funds to pay for a second lawyer; the compelling State interest which justifies denial of the People's rights to be heard and to have access to judicial proceedings; and the express authorization by the Legislature to hold ex parte hearings on matters relating to the appointment of counsel. We question the authority of the respondent superior court to appropriate funds to pay for a second lawyer in advance of that attorney having rendered any services, when section 987.3 of the Penal Code requires the trial court to award a reasonable fee based, in part, on the "time and labor required to be spent by the attorney." Pen. Code § 987.3(b). The accounting system would, under this Court's ruling, be backwards, for counsel would now be given a lump sum to go out and hire a second lawyer, absent any public knowledge of the amounts so advanced or counsel's selection for the job. Suppose counsel wanted to hire his unemployed brother-in-law, or worse yet the judge's brother-in-law? Suppose all of the funds were not spent, would the State under this Court's decision now be obliged to sue in order to retrieve the

money? These are among the perplexing questions raised by this Court's opinion based on its interpretation that Penal Code section 987.9 authorizes the secret appropriation of funds to pay for a lawyer. We contend the Legislature could not possibly have contemplated these consequences when it granted a capitally charged defendant the right to seek, in confidence, funds for investigative or expert services. Because the People have been denied their rights by virtue of this Court's construction of Penal Code section 987.9, we respectfully ask this Court to reconsider its initial ruling and grant this Petition for Rehearing.

For the foregoing reasons, the People, as real party in interest, submit that rehearing should be granted and the matter remanded to the trial court, in order for it to exercise its jurisdiction and discretion in the first instance by holding a public hearing on petitioner's motion for a second court-appointed attorney, at which hearing the People will be entitled to notice and an opportunity to be heard.

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DATED: February 23, 1982

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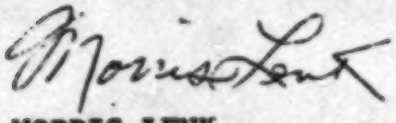

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E X H I B I T A

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL No. 938

Introduced by Assemblyman Goggin

March 15, 1977

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to amend Sections 859b and 861 of, and to add Section 861 to, the Penal Code, relating to trials.

LEGISLATIVE COUNSEL'S DIGEST

AB 938, as introduced, Goggin (Crim.J.). Preliminary examination and trial.

Existing law provides that a defendant in custody, unless he waives the right, has the right to have the preliminary examination within 10 court days of the date he is arraigned or pleads, whichever is later.

This bill would permit the district attorney to request the preliminary examination to be held within 10 court days of the date [illegible] is arraigned or pleads, whichever is later.

Existing law provides that the [illegible] of the preliminary examination cannot be for more than 5 days at a time or 6 days total unless by consent or on motion of the defendant.

This bill would require that the consent or motion to postpone be made by all parties.

Existing statutory law and constitutional law provide that a defendant has the right to a speedy trial and statutory law provides for dismissal of criminal actions which are not brought to trial within specified time limits.

This bill would provide that the people shall have the right to a speedy trial and that the people may request the trial of a defendant to begin within 60 days of the date of arraign-

ment. The bill would further provide that a continuance may be granted only for good cause and only for a period of 10 court days.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 859b of the Penal Code is amended to read:

859b. At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, must set a time for the examination of the case and must allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. He must also issue subpoenas, subscribed by him, for witnesses within the state, required either by the prosecution or the defense. Unless the defendant waives the right, the defendant if he is in custody shall have the right to preliminary examination within 10 court days of the date he is arraigned or pleads, whichever occurs later.

The district attorney may request that the preliminary examination be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later. Any continuance beyond the 10-day period shall be in accordance with Section 861.

SEC. 2. Section 861 of the Penal Code is amended to read:

861. ~~If 15 days~~ The examination must be completed at one session, unless the magistrate, for good cause shown by affidavit, postpone it. The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of ~~the defendant~~ *all parties.*

SEC. 3. Section 931 is added to the Penal Code, to read:

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991. The people shall have the right to a speedy trial. The people may request that the trial of the defendant begin within 60 days of the date of arraignment. Any continuance beyond 60 days of the date of arraignment shall be granted only for good cause and only for a period of 10 court days.

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AMENDED IN ASSEMBLY MAY 9, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL No. 938

Introduced by Assemblyman Goggin

March 15, 1977

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to ~~amend Sections 859b and 861 of, and to add Section 931 to, the Penal Code, relating to trials.~~ *add Article 13 (commencing with Section 6191) to Chapter 4 of Division 3 of the Business and Professions Code, and to amend Section 987 of, and to add Section 987.9 to, the Penal Code, relating to attorneys, and making an appropriation therefor.*

LEGISLATIVE COUNSEL'S DIGEST

AB 938, as amended, Goggin (Crim. J.). *Counsel in capital cases: investigation funds.* ~~Preliminary examination and trial.~~

Existing law provides for the assignment of counsel in capital cases.

This bill would require the State Bar of California to prepare a list of criminal defense attorneys specially qualified to represent a defendant in a capital case. The bill would require the State Bar to promulgate regulations, as specified, with respect to such defense attorneys. Only an attorney appearing on the list could be appointed by the court to represent a defendant in a capital case.

This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would also appropriate $1,100,000 from the General

Fund, to be allocated in specified amounts for these purposes.

~~Existing law provides that a defendant in custody, unless he waives the right, has the right to have the preliminary examination within 10 court days of the date he is arraigned or pleads, whichever is later.~~

~~This bill would permit the district attorney to request the preliminary examination to be held within 10 court days of the date the defendant is arraigned or pleads, whichever is later.~~

~~Existing law provides that the postponement of the preliminary examination cannot be for more than 2 days at a time or 6 days total unless by consent or on motion of the defendant.~~

~~This bill would require that the consent or motion to postpone be made by all parties.~~

~~Existing statutory law and constitutional law provide that a defendant has the right to a speedy trial and statutory law provides for dismissal of criminal actions which are not brought to trial within specified time limits.~~

~~This bill would provide that the people shall have the right to a speedy trial and that the people may request the trial of a defendant to begin within 60 days of the date of arraignment. The bill would further provide that a continuance may be granted only for good cause and only for a period of 10 court days.~~

Vote: ~~majority~~ ⅔. Appropriation: ~~no~~ *yes*. Fiscal committee: ~~no~~ *yes*. State-mandated local program: ~~no~~ *yes*.

The people of the State of California do enact as follows:

~~SECTION 1. Section 859b of the Penal Code is amended to read:~~

~~859b. At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, must set a time for the examination of the case and must allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the~~

~~examination. He must also issue subpoenas, subscribed by him, for witnesses within the state required either by the prosecution or the defense. Unless the defendant waives the right, the defendant if he is in custody shall have the right to preliminary examination within 10 court days of the date he is arraigned or pleads, whichever occurs later.~~

~~The district attorney may request that the preliminary examination be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later. Any continuance beyond the 10-day period shall be in accordance with Section 682.~~

~~SEC. 6. Section 682 of the Penal Code is amended to read:~~

~~682. The examination must be completed at one session, unless the magistrate, for good cause shown by affidavit, postpone it. The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of all parties.~~

~~SEC. 7. Section 686.1 is added to the Penal Code, to read:~~

~~686.1. The people shall have the right to a speedy trial. The people may request that the trial of the defendant begin within 60 days of the date of arraignment. Any continuance beyond 60 days of the date of arraignment shall be granted only for good cause and only for a period of 10 court days.~~

SECTION 1. Article 13 (commencing with Section 6191) is added to Chapter 4 of Division 3 of the Business and Professions Code, to read:

Article 13. Eligibility of Attorneys to Represent Defendants in Capital Cases

6191. (a) The State Bar shall prepare a list of criminal defense attorneys specially qualified to represent a defendant in a capital case and shall distribute such list to every trial court where a capital case is pending. Such list shall be reviewed and updated on an annual basis.

(b) In complying with subdivision (a), the State Bar shall promulgate appropriate regulations, including but not limited to the following:

(1) Eligibility criteria shall be developed to identify criminal attorneys who are specially qualified to represent a defendant in a capital case.

(2) Criminal defense attorneys shall be considered for inclusion on the list established under this section based on individual application to the State Bar.

(3) It shall be incumbent upon the trial court judge who must assign counsel in a capital case to request from the State Bar the list of attorneys established under this section.

(4) No attorney, including a local public defender, shall be appointed by the court unless the attorney's name appears on the list established under this section.

6192. The State Bar may delegate the duties and responsibilities set out in Section 6191 to an affiliated bar association whose membership is limited to attorneys specializing in the defense of criminal cases.

SEC. 2. Section 987 of the Penal Code is amended to read:

987. (a) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assitance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.

(b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at a public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him, *pursuant to Section 6191 of the Business and Professions Code*, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him *pursuant to Section 6191 of the Business and Professions Code*. If the defendant is able to employ

counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to ~~him~~ *him pursuant to Section 6191 of the Business and Professions Code.*

SEC. 3. Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. Upon receipt of such application, the court shall disburse the amount requested to the defendant's attorney.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all monies received and disbursed pursuant to this section.

SEC. 4. The sum of one million one hundred thousand dollars ($1,100,000) is hereby appropriated from the General Fund, to be allocated according to the following schedule:

(a) One million dollars ($1,000,000) to the State Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

(b) One hundred thousand dollars ($100,000), without regard to fiscal years, to the State Bar to enable the performance of the duties specified in Section 6191 of the Business and Professions Code.

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AMENDED IN ASSEMBLY MAY 19, 1977

AMENDED IN ASSEMBLY MAY 9, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL No. 938

Introduced by Assemblyman Goggin

(Principal Coauthor: Senator Deukmejian)

March 15, 1977

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to ~~add Article 13 (commencing with Section 6101) to Chapter 4 of Division 3 of the Business and Professions Code, and to amend Section 987 of;~~ and to add Section 987.9 to, the Penal Code, relating ~~to attorneys;~~ *to investigation funds*, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 938, as amended, Goggin (Crim. J.). ~~Counsel in capital~~ *Capital* cases: investigation funds.

Existing law provides for the assignment of counsel in capital ~~cases.~~ *cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.*

~~This bill would require the State Bar of California to prepare a list of criminal defense attorneys specially examined to represent a defendant in a capital case. The bill would require the State Bar to promulgate regulations, as specified, with respect to such defense attorneys. Only an attorney appearing on the list could be appointed by the court to represent a defendant in a capital case.~~

This bill would provide for payment of investigators, ex-

perts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would ~~also~~ appropriate ~~$1,109,033~~ *$1,000,000* from the General ~~Fund, to be allocated in specified amounts for these purposes.~~ *Fund to the State Controller for allocation and disbursement to local agencies.*

Vote: ⅔. Appropriation: yes. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

~~SECTION 1. Article 13 (commencing with Section 6101) is added to Chapter 4 of Division 3 of the Business and Professions Code, to read:~~

~~Article 13. Eligibility of Attorneys to Represent Defendants in Capital Cases~~

~~6101. (a) The State Bar shall prepare a list of criminal defense attorneys specially qualified to represent a defendant in a capital case and shall distribute such list to every trial court where a capital case is pending. Such list shall be reviewed and updated on an annual basis.~~

~~(b) In complying with subdivision (a), the State Bar shall promulgate appropriate regulations including but not limited to the following:~~

~~(1) Eligibility criteria shall be developed to identify criminal attorneys who are specially qualified to represent a defendant in a capital case.~~

~~(2) Criminal defense attorneys shall be considered for inclusion on the list established under this section based on individual application to the State Bar.~~

~~(3) It shall be incumbent upon the trial court judge who must assign counsel in a capital case to request from the State Bar the list of attorneys established under this section.~~

~~(4) No attorney, including a local public defender, shall be appointed by the court unless the attorney's name appears on the list established under this section.~~

~~6102. The State Bar may delegate the duties and~~

~~responsibilities set out in Section 6191 to an affiliated bar association whose membership is limited to attorneys specializing in the defense of criminal cases.~~

~~SEC. 2. Section 987 of the Penal Code is amended to read:~~

~~987. (a) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.~~

~~(b) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel. Inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him pursuant to Section 6191 of the Business and Professions Code, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him pursuant to Section 6191 of the Business and Professions Code. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to him pursuant to Section 6191 of the Business and Professions Code.~~

~~SEC. 3.~~ *SECTION 1.* Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the

defense. Upon receipt of such application, ~~the court shall disburse the amount requested to the defendant's attorney.~~ *a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.*

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

~~SEC. 4. The sum of one million one hundred thousand~~

SEC. 2. The sum of one million dollars ~~($1,100,000)~~ *($1,000,000)* is hereby appropriated from the ~~General~~ Fund, ~~to be allocated according to the following schedule:~~

~~(a)~~ ~~One million dollars ($1,000,000)~~ ~~to the State~~ *General Fund to the State* Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

~~One hundred thousand dollars ($100,000), without regard to fiscal years, to the State Bar to enable the performance of the duties specified in Section 6001 of the Business and Professions Code.~~

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AMENDED IN SENATE AUGUST 11, 1977

AMENDED IN ASSEMBLY MAY 19, 1977

AMENDED IN ASSEMBLY MAY 9, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL No. 938

Introduced by ~~Assemblyman Goggin~~ *Assemblymen Goggin and Wornum*
(Principal Coauthor: Senator Deukmejian)

March 15, 1977

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to add Section 987.9 to, the Penal Code, relating to investigation funds, ~~and making an appropriation therefor.~~ *making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.*

LEGISLATIVE COUNSEL'S DIGEST

AB 938, as amended, Goggin. (Crim. J.). Capital cases: investigation funds.

Existing law provides for the assignment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.

This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would appropriate $1,000,000 from the General Fund to the State Controller for allocation and disbursement to local agencies.

This bill would take effect immediately as an urgency stat-

e, but would be operative only if SB 155 is chaptered.
Vote: ⅔. Appropriation: yes. Fiscal committee: yes. State-
andated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. *The fact that such an application has been made shall be confidential and the contents of the application shall be confidential.* Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. *The ruling on the reasonableness of the request shall be made at an in camera hearing.* In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

SEC. 2. *This act shall become operative only if Senate Bill No. 155 of the 1977–78 Regular Session is chaptered.*

SEC. 3. The sum of one million dollars ($1,000,000) is hereby appropriated from the General Fund to the State Controller for allocation and disbursement to local agencies pursuant to Section 2201 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health,

or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies one aspect of the constitutional infirmities found to be in existing law; and in order to guarantee the public the protection inherent in an operative death penalty law, it is necessary that this act take effect immediately.

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Best Copy Available

Assembly Bill No. 938

Passed the Assembly September 9, 1977

_____

Chief Clerk of the Assembly

Passed the Senate September 8, 1977

_____

Secretary of the Senate

This bill was received by the Governor this _____ day of _____, 1977, at ____ o'clock ___ M.

_____

Private Secretary of the Governor

2 938 5 25

CHAPTER____

An act to add Section 987.9 to, the Penal Code, relating to investigation funds, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 938, Goggin. Capital cases: investigation funds.

Existing law provides for the assignment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.

This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would appropriate $1,000,000 from the General Fund to the State Controller for allocation and disbursement to local agencies.

This bill would take effect immediately as an urgency statute, but would be operative only if SB 155 is chaptered.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that such an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an

appropriate amount of money to defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

SEC. 2. This act shall become operative only if Senate Bill No. 155 of the 1977–78 Regular Session is chaptered.

SEC. 3. The sum of one million dollars ($1,000,000) is hereby appropriated from the General Fund to the State Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies one aspect of the constitutional infirmities found to be in existing law, and in order to guarantee the public the protection inherent in an operative death penalty law, it is necessary that this act take effect immediately.

Approved _____, 1977

_____

Governor

Assembly Bill No. 938

CHAPTER 1048

An act to add Section 987.9 to, the Penal Code, relating to investigation funds, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 24, 1977. Filed with Secretary of State September 24, 1977.]

LEGISLATIVE COUNSEL'S DIGEST

AB 938, Goggin. Capital cases: investigation funds.

Existing law provides for the assignment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.

This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases.

The bill would appropriate $1,000,000 from the General Fund to the State Controller for allocation and disbursement to local agencies.

This bill would take effect immediately as an urgency statute, but would be operative only if SB 155 is chaptered.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 987.9 is added to the Penal Code, to read:

987.9. In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that such an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

SEC. 2. This act shall become operative only if Senate Bill No.

155 of the 1977–78 Regular Session is chaptered.

SEC. 3. The sum of one million dollars ($1,000,000) is hereby appropriated from the General Fund to the State Controller for allocation and disbursement to local agencies pursuant to Section 2231 of the Revenue and Taxation Code to reimburse such agencies for costs incurred by them pursuant to this act.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies one aspect of the constitutional infirmities found to be in existing law, and in order to guarantee the public the protection inherent in an operative death penalty law, it is necessary that this act take effect immediately.

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DECLARATION OF SERVICE BY MAIL

Re: MAURICE JOHN KEENAN v. SUPERIOR COURT (San Francisco) No. 24309

I, Priscilla Clarfield declare that I am over 18 years of age, and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102. I served a true copy of the attached

PETITION FOR REHEARING

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Honorable Arlo E. Smith, District Attorney
City & County of San Francisco
Hall of Justice
880 Bryant Street
San Francisco, California 94103

Honorable Carl M. Olsen, Clerk
City & County of San Francisco
Hall of Justice
880 Bryant Street, Room 316
San Francisco, California 94103

M. Gerald Schwartzbach
Attorney at Law
1779 Union Street
San Francisco, California 94125

Steven Diaz
Deputy City Attorney
City Hall
San Francisco, California 94102

1 copy Court of Appeal
(Hand delivered)

Each said envelope was then, on February 23, 1982 sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on February 23, 1982, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

Priscilla Clarfield
DECLARANT

APPENDIX E

ATTORNEY GENERAL--OFFICE COPY

No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

SUPREME COURT
FILED
MAY 21 1982
LAURENCE P. GILL, Clerk
Deputy

PETITION FOR REHEARING

GEORGE DEUKMEJIAN, Attorney General
of the State of California

ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General - Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

WILLIAM D. STEIN
Assistant Attorney General

ANN K. JENSEN
Deputy Attorney General

MORRIS LENK
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1338

Attorneys for Real Party in Interest

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No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,	)
Petitioner,	)
vs.	)
SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,	)
Respondent,	)
THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Real Party in Interest.	)

PETITION FOR REHEARING

TO: THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rules 24(a) and 27 of the California Rules of Court, respondent Superior Court hereby petitions for rehearing of the Court's decision in this case as modified on May 6, 1982. Rehearing is necessary because the Court's modified opinion (1) is factually incorrect, internally inconsistent and unclear about the procedures to be employed when the trial courts of this State are asked to appoint defense counsel; (2) orders relief never sought by petitioner from respondent court; (3) creates a species of confidential proceedings not

authorized by law; and (4) grants a writ of mandate under circumstances in which respondent court could not have legally exercised its discretion other than as it did by denying funds for second counsel under Penal Code section 987.9. Accordingly, respondent court files this Petition for Rehearing.

ARGUMENT

I

MODIFICATION OF THE COURT'S JUDGMENT IN THIS CASE MAKES THIS PETITION FOR REHEARING TIMELY.

Rule 24(a) of the California Rules of Court states in pertinent part:

> "Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification."

Regarding the effect of a modification of an opinion before the judgment becomes final, and whether such modification starts a new time period before the opinion becomes final, Mr. Witkin states:

> "Under Rule 24(a), following

the prior case law, this depends on whether the court merely changes the legal discussion or affects the rights of the parties (e.g., by changing the amount of the recovery) . . . ."
Witkin, VI Cal. Proc., Appeal, § 512 at pp. 4461-4462.

The judgment of the original opinion in this case was:

"Let a peremptory writ of mandate issue directing respondent court to allocate reasonable funds to pay for a second attorney." Keenan v. Superior Court (1982) 30 Cal.3d 750, 759.

The judgment of the modified opinion now states:

"Let a peremptory writ of mandate issue directing respondent court to appoint a second attorney for defendant."
(Mod. Op. No. 9 at p. 4).

Thus, whereas respondent court was first ordered, pursuant to Penal Code section 987.9, to allocate reasonable funds to pay for a second defense attorney, that court now has been directed to appoint a second attorney for defendant without allocating any funds under section 987.9. Since this modification of the opinion not only changes the relief due petitioner, but also issues a new directive to respondent court, it is clear that there has been a modi-

fication of this Court's judgment. Hence this Petition for Rehearing is timely and authorized by law.

II

AS MODIFIED THIS COURT'S OPINION IS FACTUALLY INCORRECT, INTERNALLY INCONSISTENT, CONFUSING AND WRONGLY DECIDED.

Via the modified opinion, we have been officially informed for the first time that the Court heretofore "determined that the People should not be a real party in interest" (Mod. Op. No. 2 at p. 2), and that the Attorney General appears in this case as "amicus curiae" (Ibid.). To set the record straight, on February 23, 1982, the California Attorney General was substituted for the San Francisco City Attorney as attorney of record for the respondent superior court. Attached hereto as Exhibit A is a copy of the Notice of Substitution of Attorneys, which was filed in this case and served upon counsel for petitioner according to Rule 48 of the California Rules of Court. While the California Attorney General, of course, always appears before this Court as a friend of the Court, our appearance herein is as counsel for a party in this proceeding, and not as mistakenly stated in the modified opinion as an amicus curiae. The factually unfounded assertion about our status as counsel should be corrected.

Secondly, we question the authority by which the People have been, in effect, dismissed from this case

as the real party in interest. Code of Civil Procedure section 1107 authorizes a court, in its discretion and for good cause shown, to grant an application for a prerogative writ of mandate or prohibition ex parte and without notice or service of the application. Rule 56(b) of the California Rules of Court likewise permits a reviewing court, in its discretion, to allow the filing of a petition for writ of mandate or prohibition without service upon the real party in interest. Except for Penal Code section 987.9, no authority is cited in the Court's modified opinion for the proposition that a court can dismiss a real party in interest from a case. Yet, as is elsewhere recognized in the opinion as now modified, Penal Code section 987.9 does not provide for the appointment of counsel (Mod. Op. Nos. 4 and 8 at pp. 2-3 and 4). Since the only cited ground for determining that the People should not be a real party in interest, namely Penal Code section 987.9, has been held inapplicable to this case, there is no justification for the People's removal as the real party in interest. The determination that the People should not be a real party in interest, lacking any basis in law, is accordingly invalid. For the reasons already expressed in the first Petition for Rehearing at pp. 2-15, respondent submits that the People's right to due process of law, including notice and an opportunity to be heard, is violated by their secret dismissal from this proceeding.

The opinion of this Court as presently written is, moreover, internally inconsistent. The opinion still begins by stating that petitioner

> "seeks a writ of mandate to compel respondent superior court to grant his motion for public funds to pay for the services of a second attorney to assist in the preparation of his defense. He relies on Penal Code section 987.9 as authority for this request."
> Keenan v. Superior Court, supra, 30 Cal. 3d at 752; fn. omitted.

The very next sentence now states the Court's holding:

> "[W]e hold that the trial court abused its discretion in denying appointment of additional counsel but that the appointment should be made under section 987, subdivision (b), . . ."
> (Mod. Op. No. 1 at p. 1).

Something must be seriously wrong when a petitioner moves a court for funds to employ second counsel under a specific statute, i.e., Penal Code section 987.9; a judge of that court denies this request; the reviewing court later agrees that funds should not have been appropriated, and that appointment of counsel should have been requested under a different statute, i.e., Penal Code section 987(b); the reviewing court nevertheless holds that the lower

court abused its discretion by failing to do (a) what the petitioner never asked it to do and (b) what the reviewing court says it had no authority to do because the request for appointment of counsel should have been made before the trial court. The logic of such a progression is hard to discern, especially when it is recalled that under Code of Civil Procedure, section 1068:

> "A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal, . . . exercising judicial functions, has exceeded the jurisdiction of such tribunal, ..."

According to the Court's modified opinion, respondent court could not have exceeded and did not exceed its jurisdiction when it denied petitioner's request for funds to employ a second attorney under Penal Code section 987.9. Rather, respondent court correctly and properly exercised that jurisdiction in the only legally permissible manner. The result in this case is certainly bizarre, for this Court simultaneously upholds respondent court's denial of funds under section 987.9, while finding that respondent court abused its discretion by failing to address the specific reasons advanced by petitioner's attorney in support of the motion seeking funds under that statute (Mod. Op. No. 7 at p. 4). If, as the Court now acknowledges, Penal Code section 987.9 is the wrong statute for seeking

appointments of counsel, then the respondent court, as a matter of law, could not have granted petitioner's request for funds to employ co-counsel regardless of the reasons advanced by petitioner.

> "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."
>
> D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19.

Concededly now, respondent court correctly exercised its jurisdiction because Penal Code section 987.9, the statute under which it was asked to act, has no application to appointments of counsel. Instead of holding that the trial court somehow erred, the onus should be placed upon petitioner for seeking relief before the wrong judge under the wrong statute.

Respondent court had but two choices at the time it denied petitioner's request for funds to employ another

attorney. The judge could have granted the request, or he could have denied it. The alternative now created by this Court, denying the request for money but ordering the appointment of counsel, was not an option available to the 987.9 judge. This is because Penal Code section 987.9 is very specific when it states that an application for funds to employ experts, investigators and others shall be made before ". . . a judge of the court, other than the trial judge presiding over the capital case in question, ..." Apparently, this Court now recognizes that requests for appointments of additional counsel are to be made to the trial court (Mod. Op. No. 1 at p. 1; No. 4 at p. 3). But, having recognized that petitioner should have made a request for appointment of co-counsel before the assigned trial court judge, this Court's decision in Williams v. Superior Court (1939) 14 Cal.2d 656, allows no other judge of the respondent superior court jurisdiction to appoint an additional defense attorney, except for the trial court judge.

> "[W]here a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof, and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the juris-

dictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation]. In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts." Id. at 662. Accord People v. Batchelor (1976) 56 Cal.App.3d 278, 284; In re Kowalski (1971) 21 Cal.App. 3d 67, 70; People v. Stuyvesant Ins. Co. (1968) 261 Cal.App.2d 773, 786; Thomasian v. Superior Court (1953) 122 Cal.App.2d 322, 332.

The 987.9 judge (in this case Judge Hanlon) would have unlawfully interfered with the power of the trial judge (in this case Judge Dandurand) had Judge Hanlon attempted to appoint additional counsel as this Court's opinion apparently now requires that he do. This Court's modified opinion wholly fails to distinguish between the authority of the section 987.9 judge to appropriate funds for specified purposes, versus that of the trial court judge to appoint counsel under section 987(b). Despite the specific delineation of authority

created by the Legislature, the Court's new opinion seems to group together the 987.9 judge with the trial court judge, as if they each could exercise their respective functions interchangeably. This commingling of the judges of respondent superior court is contrary to the express language of section 987.9, and constitutes a silent overruling of the law of this State as announced in Williams v. Superior Court, supra, which has since been consistently followed by the Courts of Appeal.

Confusion is also now engendered as to which judge is to hear motions for appointment of co-counsel in death penalty cases. Although dictum in the Court's modified opinion suggests that the motion should be made before the trial court judge under Penal Code section 987(b), the Court holds that the Penal Code section 987.9 judge erred by not making the appointment, despite the fact that section 987.9 does not provide for the appointment of counsel. The Court's holding is thus at odds with the ordinary procedures requiring that motions be made before the judge assigned to hear a case, as opposed to some other judge of the superior court. Furthermore, because the Court's holding is directed to the 987.9 judge, it would appear that the opinion is only advisory insofar as the trial court judge is concerned. The law on the matter of appointment of counsel should not be left in this unsettled state, with this Court suggesting that such motions should be heard by the judge assigned for trial,

while apparently mandating that a judge other than the trial court judge make the appointment of co-counsel.

In summary, and with all due respect, this Court's newly written opinion is a mishmash. A judge, asked by petitioner to allocate funds for a second defense attorney, has his decision denying that request reversed, even though this Court now holds that the judge had no statutory authority to grant the money for that purpose. And, contrary to precedent dating over 40 years, which specifically prohibits one judge from interfering with a case assigned to another judge of the same court, this Court seems to hold that Judge Hanlon abused his discretion by failing to intervene and appoint additional counsel in a case assigned to Judge Dandurand for trial. Since Judge Hanlon was neither asked nor authorized to appoint co-counsel for petitioner, respondent fails to see how that judge can be said to have abused his discretion when, under Auto Equity, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, that judge was bound by this Court's decision in Williams v. Superior Court, supra.

III

"CONFIDENTIAL" MOTIONS FOR APPOINTMENT OF COUNSEL ARE LEGALLY UNAUTHORIZED AND UNNECESSARY.

"By analogy" to Penal Code section 987.9, this Court's modified opinion now holds that a defense motion for co-counsel can be made "confidentially" (Mod. Op.

No. 4 at p. 3). The authority cited in support of this proposition is inapposite and no reason is given why the mere making of the motion should be a secret.

Two decisions, Puett v. Superior Court (1979) 96 Cal.App.3d 936, 940, fn. 2, and People v. Faxel (1979) 91 Cal.App.3d 327, 330, fn. 1, are cited in this Court's modified opinion as support for its conclusion that a defense counsel is entitled to make a "confidential" motion for appointment of a second attorney. As will be shown, neither case provides a basis for the Court's ruling.

In both Puett and Faxel, the defense motions for appointments of investigators were made in open court:

> "Defendant's motion was denominated a motion for an order appointing an investigator or alternatively approving investigative expenses. . . . [¶] The motion came on for hearing on April 16, two days before the scheduled preliminary hearing."
>
> Puett v. Superior Court, 96 Cal.App.3d, supra, at 940.

In Faxel, the court's opinion indicates only that on three occasions the defendant, appearing in pro per, sought the appointment of an investigator or runner. The opinion does not suggest, much less hold, that the motion could be made confidentially. Rather, what both

Puett and Faxel do state in the footnotes cited by this Court is that "the showing" on the defendants' motions could be made in camera in order to satisfy the requirements of Prudhomme v. Superior Court (1970) 2 Cal.3d 320. Puett v. Superior Court, 96 Cal.App.3d, supra, at 940, fn. 2; People v. Faxel, 91 Cal.App.3d, supra, at 330-331, fn. 1 (emphasis added).[1/] These cases implicitly acknowledge the distinction between a motion and a showing on such motion, whereas this Court's modification, again, groups the two together, apparently not recognizing that there is a difference.

Code of Civil Procedure section 1004 states:

> "Except as provided in section 166 of this code, motions must be made in the court in which the action is pending."

Section 166 of the Code of Civil Procedure, in turn, authorizes certain motions to be made "at chambers." A judge may

> "[g]rant all orders and writs which are usually granted in the first instance upon an ex parte application, and may

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1/ " To permit the defendant to make the required showing without unduly requiring the disclosure of his defense, the defendant may make his showing at an in camera hearing outside the presence of the prosecutor; however, a record of the proceedings in camera should be preserved so that the court's determination may be reviewed. (See People v. Faxel, supra, 91 Cal.App.3d at pp. 330-331, fn. 1.)" (Emphasis added.)

at chambers, hear and dispose of such orders and writs; . . . ."

The statute then goes on to list the sorts of matters which can be heard at chambers (Ibid.). Motions for appointment of counsel are not among the listed exceptions.

As this Court has previously held, "unless expressly authorized by statute, a judge cannot transact judicial business in chambers." Carpenter v. Nutter (1889) 127 Cal. 61, 64; Loomis v. Andrews (1874) 49 Cal. 239, 240; see Larco v. Casanueva (1866) 30 Cal. 560, 564; Code Comm's Notes to Code of Civil Proc., § 166.

> "In general, 'all judicial business must be transacted in court, and the authority to transact such business out of court is exceptional, and does not exist unless expressly authorized by statute.'" Richmond v. Shipman (1976) 63 Cal.App.3d 340, 343, quoting Shepherd v. Superior Court (1921) 54 Cal.App. 673, 676.

Penal Code section 987.9 expressly authorizes the making of confidential motions in camera; Penal Code section 987(b), the statute for appointing counsel, does not. Absent such legislative direction, respondent submits there is no authority allowing a motion for additional counsel to be made ex parte. See also, Mosk v. Superior Court (1979) 25 Cal.3d 474, 492-493, for its discussion

of authority permitting "confidential" as opposed to public proceedings.

In short, the two cases cited by this Court (Puett and Faxel, supra) provide no legal basis for the making of confidential motions seeking appointment of co-counsel. And, the Legislature has not otherwise authorized such motions to be made in camera.

Nor does this Court's modified opinion posit any reason why a motion for additional counsel (again as distinguished from the showing on the motion) should be confidential. No reasons have been put forth to justify the opinion's result in this respect. "Thus, the Constitution's command that '[d]ecisions . . . be in writing with reasons stated' has been disregarded." Olson v. Cory (1980) 27 Cal.3d 532, 571 (Newman, J. dissenting). No reason has been stated, we submit, because there is none. Respondent believes the Court would have to go to great lengths to explain why the making of a motion for co-counsel should be heard in confidence. How the prosecution gains any advantage by knowing about the motion's existence remains a mystery. Where this Court decides to carve out its own judicially-created exception for defense motions to be made in camera, the least the People can expect are reasons for the Court's decision. See Cal. Const., art. VI, sec. 14.

The reason, on the other hand, why such motions should be made in public session is obvious. In case the

defendant is convicted and claims incompetence of trial counsel as a ground for reversal, the record of any defense motion for co-counsel would be of manifest importance in defending trial counsel's performance. For this reason, following conviction, the People would, of necessity, require notice of any in camera proceedings. If the making of defense counsel's motion were itself confidential, then there would be no indication of record that trial counsel had ever moved for assistance. The very existence of any "confidential" defense motion for additional counsel would thus be unknown. This state of affairs can lead to potential mischief. Because there is no reason for keeping secret such a defense motion, and good reason for its being made in public, this Court's decision in this respect is without justification.

A final matter left unexplained by this Court's newly modified opinion is why appointments of additional counsel should be analogized to Penal Code section 987.9, which deals with funding for expert and investigative assistance. Since the Court has now recognized that the existing law aside from section 987.9 provides for counsel's appointment, that existing law should be controlling on the appointment of counsel, instead of section 987.9. When the statutory basis of section 987.9 is removed from this case, that section's trappings of confidentiality should not remain. The Legislature has not authorized any confidential motions for appointment of counsel;

this Court provides no reason why those motions should be made in confidence; it follows, therefore, that the confidential making of such motions is legally unauthorized and without justification.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that this Petition for Rehearing should be granted.

DATED: May 21, 1982

GEORGE DEUKMEJIAN, Attorney General
of the State of California

ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General - Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

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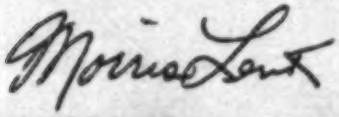

MORRIS LENK
Deputy Attorney General

Attorneys for Real Party in Interest

ML:pc
SF82MW0011

E X H I B I T A

COPY

Crim. No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,	)
Petitioner,	)
vs.	)
SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN FRANCISCO,	)
Respondent,	)
THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Real Party in Interest.	)

SUBSTITUTION OF ATTORNEYS

TO THE COURT AND COUNSEL FOR PETITIONER:

Please take notice that with the consent of the undersigned, the California Attorney General is hereby substituted as attorney of record for the Respondent, Superior Court of the State of California in and for the City and

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County of San Francisco.

DATED: February 23, 1982

HONORABLE DANIEL H. HANLON
Judge of the Superior Court

DATED: February 23, 1982

EDWARD P. O'BRIEN
Assistant Attorney General

DATED: Febru 23, 1982

GREGORY KINSLOW
Deputy City Attorney

EOB:kgw

DECLARATION OF SERVICE BY MAIL

Re: MAURICE JOHN KLEMAN v. SUPERIOR COURT (San Francisco) No. 24309

PEOPLE - Real Party in Interest

I, Priscilla Clarfield declare that I am over 18 years of age, and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102. I served a true copy of the attached

PETITION FOR REHEARING

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Honorable Arlo E. Smith, District Attorney
City & County of San Francisco
Hall of Justice
880 Bryant Street
San Francisco, California 94103

Honorable Carl M. Olsen, Clerk
City & County of San Francisco
Hall of Justice
880 Bryant Street, Room 316
San Francisco, California 94103

Steven Diaz
Deputy City Attorney
City Hall
San Francisco, California 94102

1 copy Court of Appeal
(Hand delivered)

M. Gerald Schwartzbach
Attorney at Law
1779 Union Street
San Francisco, California 94125

Each said envelope was then, on May 21, 1982, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on May 21, 1982, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

Priscilla Clarfield
DECLARANT

A P P E N D I X F

ORIGINAL

No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

FILED
2 JUL 3 P3:07
SUPREME COURT
San Francisco

MOTION TO VACATE ORDER OF APRIL 15, 1982, STRIKING PETITION FOR REHEARING AND SUBSTITUTION OF ATTORNEY; OPPOSITION TO MOTION TO STRIKE PETITION FOR REHEARING; MOTION TO DISMISS PROCEEDINGS

GEORGE DEUKMEJIAN, Attorney General
of the State of California

ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General - Criminal Division

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Telephone: (415) 557-1338

Attorneys for Real Party in Interest

No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,	)
Petitioner,	)
vs.	)
SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,	)
Respondent,	)
THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Real Party in Interest.	)

MOTION TO VACATE ORDER OF APRIL 15, 1982, STRIKING PETITION FOR REHEARING AND SUBSTITUTION OF ATTORNEY; OPPOSITION TO MOTION TO STRIKE PETITION FOR REHEARING; MOTION TO DISMISS PROCEEDINGS

TO: THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 41 of the California Rules of Court, the People of the State of California and the Respondent Superior Court of the City and County of San Francisco, by and through their attorney, the Attorney General of the State of California, move herein (1) for an order vacating this Court's April 15, 1982, order striking the petition for rehearing and substitution of attorney filed on February 23, 1982; (2) in

opposition to the motion to strike the petition for rehearing filed May 21, 1982; and (3) for an order dismissing this case because it is being heard unconstitutionally.

The above-described motions and opposition will be addressed in the order presented, with an introductory background first describing the procedural history of this case. In essence, we contend that this Court's order of April 15, 1982, is void for lack of jurisdiction, having been procured without service of process. We oppose petitioner's motion to strike the May 21, 1982, petition for rehearing because said motion is factually inaccurate and based on matters not of public record. Furthermore, the statements contained within petitioner's motion establish that there has been a clear violation of the People's right to due process of law, as guaranteed by both State and Federal Constitutions, as well as a denial of respondent court's right to counsel. Finally, based on the unconstitutionality of this proceeding, the People and respondent court move for its dismissal.

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BACKGROUND

The petition for writ of mandate filed herein sought to compel respondent superior court to allocate funds for a second defense counsel under the authority of Penal Code section 987.9.[1] Keenan v. Superior Court (1982) 30 Cal.3d 750, 752. Respondent superior court denied the requested money for a second attorney, so petitioner moved, confidentially, for relief in the appellate courts. This Court issued its opinion ordering the respondent court to allocate reasonable funds for a second attorney on February 8, 1982 (id. at 750).

The People and respondent court petitioned[2] for rehearing on February 23, 1982 (Cal. Rules of Court, R. 27), contending that confidential proceedings were unauthorized because Penal Code section 987.9 did not apply to counsel, and that the People's right to procedural due process, including notice and an opportunity to be heard, was violated by the ex parte proceedings not authorized by statute. Without serving counsel for the People and respondent court, petitioner moved to strike the petition for rehearing and to strike the

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1/ Section 987.9 permits applications for funds to employ experts, investigators and others to assist in the preparation for or presentation of the defense in a capital case. The contents of any such applications are confidential.

2/ The Attorney General substituted as counsel for respondent court in place of the San Francisco City Attorney.

substitution of attorney. Despite this absence of service, on April 15, 1982, this Court granted petitioner's motion, while also directing the parties to respond to two questions by April 27, 1982, about the application of Penal Code section 987.9 to this case. The Court's order, however, was not served on the California Attorney General until May 25, 1982.

On May 6, 1982, this Court modified its decision in substantial respects, holding that though Penal Code section 987.9 did not permit funds to be allocated for a second defense counsel, respondent court abused its discretion by failing to appoint second counsel under Penal Code section 987(b). Keenan v. Superior Court (1982) 31 Cal.3d 243, 246. "By analogy" to section 987.9, the modified opinion further held that motions for appointment of counsel can be made confidentially. Id. at 249. The People and respondent court petitioned for rehearing a second time on May 21, 1982, arguing that respondent court, as opposed to the trial court judge, had no jurisdiction under section 987.9 to make the appointment, and that any confidential motions on the appointment of counsel were legally unjustified. On May 25, 1982, petitioner served on counsel for the People and respondent court his motion to strike the second petition for rehearing.

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ARGUMENT

I

THIS COURT'S ORDER OF APRIL 15, 1982, IS VOID FOR LACK OF JURISDICTION.

"Jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in this case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction." Atschul v. Polack (1880) 55 Cal. 633, 641; see Sea World Corp. v. Superior Court (1973) 34 Cal.App.3d 494, 501 ("There is no exercise of jurisdiction where there is neither hearing nor opportunity to be heard.")

Rule 41 of the California Rules of Court, governing motions in an appellate court, requires service on all other parties, allowing opposition to the motion within 10 days' time of service.[3/] No motion to strike

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3/ Rule 7 - 108(B) of the Rules of Professional Conduct of the State Bar of California is the ethical guide on the subject of ex parte communications with a judge or judicial officer. This rule states:

"(B) A member of the State Bar shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer, except in open court; nor shall he, without

petition for rehearing and substitution of attorney was served on the Office of the California Attorney General.[4] Accordingly, since the motion was heard without allowing for opposition, no jurisdiction was created for granting said motion. Atschul v. Polack, 55 Cal., supra, at 641. The "sham and deceptive proceedings" (id.) which followed from petitioner's failure to serve the California Attorney General, requires that the order of April 15, 1982, be set aside as having been obtained through extrinsic fraud. Cf. Bloniarz v. Roloson (1969) 70 Cal.3d 143, 147.

When petitioner filed the motion to strike the petition for rehearing and substitution of attorney, he was certainly on notice that the substitution had been made. Pursuant to Code of Civil Procedure section 284:

> "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

(Footnote 3/ continued)

> furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex parte matters."

4/ Declaration of Mimi Mendenhall, Custodian of Records, Office of the California Attorney General, attached hereto as Exhibit A. Since the motion was filed, this Court can simply check the Proof of Service to substantiate this fact.

1. Upon the consent of both client and attorney, filed with the clerk or entered upon the minutes; . . . ." (Emphasis added.)[5/]

Section 285 of the Code of Civil Procedure next states:

"When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, . . . must be given to the adverse party. Until then he must recognize the former attorney."

It follows that upon receipt of the written notice of substitution of new attorney, petitioner was required to recognize the Attorney General as counsel for respondent court. See Reynolds v. Reynolds (1943) 21 Cal.2d 580, 584; Sherman v. Panno (1954) 129 Cal.App. 2d 375, 379. A court's only concerns are that the client has an attorney of record, that any change of attorney has been made as provided in section 284 of the Code of Civil Procedure, and that notice thereof has been given as required by section 285 of that code. Reynolds v. Reynolds, 21 Cal.2d, supra, at 584. The very making of

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5/ Attached hereto as Exhibit B is a copy of the notice of substitution of attorney which was filed herein on February 23, 1982, as signed by the client-respondent court, and the former and present attorneys, together with the proof of service upon counsel for petitioner.

the motion to strike the substitution of attorney establishes that petitioner had knowledge of that substitution. There is, we submit, no excuse for petitioner's failure to serve the Attorney General in this matter.[6/]

By virtue of Code of Civil Procedure section 285, it is settled in this State that a client has an absolute right to change attorneys at any stage in the action. Meadow v. Superior Court (1963) 59 Cal.2d 610, 616; Wright v. Security Nat'l Bank (1939) 13 Cal.2d 139, 141-142.[7/] It is not the prerogative of counsel for the opposing party to determine whether to recognize the substitution of attorney, for this would deny the client's right to counsel of choice. Nor may the courts unduly interfere with a party's choice of counsel. Maxwell v. Superior Court (1981) 30 Cal.3d 606, 615; Smith v. Superior Court (1968) 68 Cal.2d 547, 559; People v. Crovedi, 65 Cal.2d, supra, at 206. Denial of

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6/ When he saw fit, petitioner chose to serve the Attorney General with his reply brief of April 27, 1982, and the motion to strike petition for rehearing of May 25, 1982 (Proofs of Service attached hereto as Exhibits C and D, respectively). We thus have the spectacle of a party to a proceeding apparently deciding which pleadings and motions he will serve on the opposing party according to his own dictates. In other words, counsel has taken upon himself the decision when his communications with this Court are either properly served or not, and whether they are ex parte or not.

7/ The absoluteness of this rule is tempered by the recognition that any changing of attorney cannot be used as an excuse for delay or to disrupt the orderly processes of justice. People v. Crovedi (1966) 65 Cal.2d 199, 208. Issues relating to his counsel have delayed petitioner's trial for over two years.

the right to employ one's own counsel constitutes a denial of the due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. Chandler v. Fretag (1954) 348 U.S. 3, 9-10; People v. Holland (1978) 23 Cal.3d 77, 86. Respondent court herein contends that it has been unconstitutionally deprived of its right to counsel.

The practical effect of petitioner's motion is apparent. Through the stratagem of never serving the California Attorney General with the motion to strike the petition for rehearing and substitution of attorney, respondent court was denied its right, under Rule 27 of the California Rules of Court, to file a petition for rehearing. And, by the time this Court granted petitioner's motion on April 15, 1982, any new petition for rehearing would have been untimely. This result is untenable and unconscionable.

Respondent submits that to allow the sort of gamesmanship practiced in this case -- a party moving to strike a petition for rehearing and substitution of counsel without serving the motion on opposing counsel of record -- makes a mockery of any concept of justice. One can imagine, if the shoe were on the other foot, and the People had moved to strike a defendant's brief without service on opposing counsel, thereby seeking to deprive the defendant of the right to an appeal, the legitimate cries of rage that would be heard from this or any

other court. But, instead of outcry, we learn more than a month after the order is entered that this Court has granted petitioner's unserved motion. Without overstating the matter, this case has turned into a ridiculous travesty. Motions and orders are made striking briefs and dismissing counsel of record without notice to counsel under a seal of "confidentiality" that is without authorization of law. This Court should unequivocally reject petitioner's repeated attempts to involve it in the violations of court rules, standards of ethics, and statutory and decisional law. The guise of protecting petitioner's constitutional rights does not justify the trampling of the People's and the respondent court's constitutional right to be heard.

II

OPPOSITION TO MOTION TO STRIKE PETITION FOR REHEARING.

Petitioner makes this statement in his motion to strike the People and respondent court's May 21, 1982, petition for rehearing:

> "This Court . . . has made perfectly clear that the People are not a party to this proceeding. . . ." (Motion at 1:17-18)

Not so.

Attached hereto as Exhibit E is the face-sheet of this Court's opinion as issued on February 8, 1982. It states, after listings of the petitioner's and respondent court's names, "THE PEOPLE, Real Party in

Interest" (Exhibit E). Thus, appearing on the caption of the opinion in this case is the name of the People. We cannot indulge in the assumption, evidently proposed by petitioner, that this Court was merely using the People's name in vain, on February 8, 1982, when the Court issued its opinion naming them as the Real Party in Interest.

Next, page 12 of the original printed opinion contained these words at footnote 12:

> "The People denigrate defendant's problem [etc.] . . . ." (Exhibit F attached hereto).

This hardly constitutes a clear indication, much less a "perfectly clear" one, that the People are not a party to this proceeding.[8/]

Moreover, perusing this Court's Minute Orders of April 8, 1982, which appear in vol. 11 of the California Official Reports, at p. 20, a reader again observes the People's name as the "Real Party in Interest" (Exhibit G attached hereto). As of April 8, 1982, the People could certainly consider themselves a party to this dispute.

Attached hereto as Exhibit H is a copy of an

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8/ We note, however, that appearing at 30 Cal.3d p. 758, this reference to the "People" has been changed to "Respondent."

April 15, 1982, Order of this Court.[9] This Order, too, names the "People, Real Party in Interest." On April 15, 1982, one would have to conclude that the People were, indeed, a party, otherwise why would their name be on the Order? Is the clear indication then, that the People were not a party?

Not until May 6, 1982, the date this Court modified its decision of February 8, 1982, was it stated at p. 2:

> ". . . when we first considered this matter we . . . determined that the People should not be a real party in interest."

So here, on May 6, 1982, we have the "perfectly clear" indication, in this Court's modified opinion, that the People should not be a Real Party in Interest. Of course, the second petition for rehearing is directed toward this modified decision which excludes the People.[10]

The only articulated basis for concluding that

9/ This Order was not served upon counsel for the People until May 25, 1982, more than a month after its issuance. Nor was petitioner's motion to strike the February 23, 1982, petition for rehearing and substitution of attorney served on the People (Exhibit A).

10/ Although petitioner elsewhere states that on February 5, 1981, this Court struck the designation of the People as Real Party in Interest (Motion at 1:21), nothing beyond petitioner's statement supports this conclusion. Certainly nothing in the public record supports it. If true, the Order was invalid ab initio because it was made without notice to the People, and without affording them the opportunity to be heard on their having been stricken as a party.

the People should not be a Real Party in Interest is Penal Code section 987.9, a statute which the modified opinion explicitly acknowledges has no application to appointments of counsel (Mod. Opn. Nos. 4 & 8, at pp. 2-3 & 4). Consequently, it appears that the People have been stricken as a Real Party in Interest on the sole authority of a statute having no bearing on applications for appointments of counsel. The People challenge their exclusion from this case as a party without giving them the notice and opportunity to be heard guaranteed by the United States Constitution.

Petitioner further states:

> ". . . The Attorney General is not the attorney for any party to this proceeding." (Motion at 1:18-19).

This unsupported assertion deserves a response.

The Attorney General is a constitutional officer of this State. Cal. Const. art. V, sec. 13. He is the "chief law officer of the State[.]" (ibid.), whose duty it is to "see that the laws of the State are uniformly and adequately enforced." (Ibid.). The Attorney General is the highest nonjudicial legal officer in California, and is particularly charged with supervising the administration of this State's criminal laws. Phyle v. Duffy (1948) 334 U.S. 431, 441. "The Attorney General has charge, as attorney, of all legal matters in which the State is interested. . . ." Cal. Gov't Code § 12511.

Government Code section 12512 requires that the Attorney General "shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his official capacity; . . . ." He is the "guardian of the public interest" (People ex rel. Deukmejian v. Brown (1981) 29 Cal.3d 150, 161) and the only person authorized to appear for the People in this Court. People v. Pacheco (1865) 29 Cal. 210, 213.

When the People are named in this Court's opinion, orders, and minutes (Exhibits E, F, and G), it was unquestionably the duty of the Attorney General to defend this cause. Cal. Gov't Code § 12512. When this Court erroneously applied Penal Code section 987.9, so as to require the State to fund the costs of co-counsel in all death penalty cases, the Attorney General was statutorily bound to defend the State treasury in a "legal matter in which the State is interested. . . ." Cal. Gov't Code § 12511. And, when this Court makes a record of judicial proceedings "confidential," without any basis in law, then the Attorney General, as the chief law officer of this State and "guardian of the public interest," is entitled to raise this matter on the People's behalf in order to assure that the law is not being violated. In all these respects, we submit the Attorney General is the attorney for the People in this proceeding, acting under express constitutional and statutory authorization.

Furthermore, the Attorney General is the attorney for the respondent superior court in this case. Although this Court, on April 15, 1982, ordered stricken the substitution of attorney filed by the respondent court, it is the position of respondent court that such order is beyond the powers of this Court under the California Constitution's separation of governmental powers. Article III, section 3, of the Constitution creates the three powers of State government: Legislative, Executive and Judicial. "Persons charged with exercise of one power may not exercise either of the others except as permitted by this Constitution." (Ibid.). For this Court to decide whom the Attorney General can or cannot represent in his executive and legal capacities, absent an actual conflict of interest, is violative of the Constitutional separation of powers.

In People v. Superior Court (Greer) (1977) 19 Cal.3d 255, this Court recognized that it is the executive who has the general authority to choose who will prosecute a case. "[J]udges do not have the power to direct the executive's choice of a representative for the People. . . ." (id. at 265), unless the prosecuting attorney suffers from a conflict of interests which might prejudice him against the accused and thereby affect or appear to affect, his ability to perform the functions of his office (Id. at 269; see People ex rel. Deukmejian v. Brown, 29 Cal.3d, supra.

In the instant case there has not been the slightest suggestion that the Attorney General is precluded from representing the respondent superior court because of any conflict of interest. The State's interest lies in upholding the respondent court's decision not to award petitioner funds under Penal Code Section 987.9 for associate counsel. Accordingly, respondent contends that any order of this Court restricting the Attorney General's right to appear as counsel for respondent court is constitutionally invalid, since the Attorney General in his executive capacity may choose to represent the respondent court.

The Attorney General has not needed access to respondent court's in camera hearings in order to show that Penal Code section 987.9 is totally inapplicable to appointments of counsel. In camera proceedings are held in a variety of different contexts, without having to disqualify the attorneys from appearing therein. For example, when a criminal defendant moves to replace his court-appointed attorney under People v. Marsden (1970) 2 Cal.3d 118, hearings are often conducted in camera in order that the defendant may reveal any basis for dissatisfaction with present counsel. See People v. Munoz (1974) 41 Cal.App.3d 62, 64. But, no decision of which we are aware has held that the prosecutor becomes disqualified from representing the People simply because he or she knows that the defendant has made a Marsden motion.

Similarly, when the privilege not to reveal the identity of an informant is invoked (Cal. Evid. Code §§ 1041 - 1042), the defense obviously is aware that the privilege has been exercised and that a hearing will be held in camera to resolve the claimed privilege. Defense attorneys are not disqualified from representing their clients on the ground that the prosecution has invoked a claim of statutory privilege. In still other instances, whether it be trade secrets (Evid. Code § 1060), or peace officer personnel records (Evid. Code § 1043), the court hears evidence in camera regarding these claims of privilege. Motions to disclose the evidence are made openly and any privileged matters are heard in camera. If appellate review is sought, then any matters over which a privilege is asserted remain confidential in the reviewing court. There is no reason why the rule should be any different for a defense motion to have a second attorney appointed by the court. The prosecutor does not have to be disqualified in a reviewing court on account of the defendant having made such motion.

The situation of a defendant making a motion to reveal the identity of a confidential informant, and the in camera proceedings held as a result of that motion, provide no support for the idea that a defendant can move in camera for the appointment of a second defense attorney. The two circumstances are not at all analogous because the defendant obviously knows that he wants the informant's

identity revealed and that the prosecutor is making a claim of privilege. Under this Court's modified ruling, the prosecutor never learns that a defense claim of privilege has been invoked because the proceedings are labelled "confidential."

There is not and has never been a reason to exclude the People or the Attorney General from this case, excepting petitioner's desire to obtain the tactical advantage of having counsel less familiar with the criminal law opposing him. This ruse on petitioner's part should be recognized for what it is.

Finally, under the California Constitution this Court is a Court "of record." Cal. Const. art. VI, sec. 1. Its records are public records, open to inspection by the public. "[T]here can be no doubt that court records are public records, available to the public in general, . . . unless a specific exception makes specific records nonpublic (see Craemer v. Superior Court (1968) 265 Cal.App.2d 216, 220-222)." Estate of Hearst (1977) 67 Cal.App.3d 777, 782; see 53 Ops. Cal. Att'y Gen. 25 (1970). Penal Code section 987.9 grants such a specific exemption by allowing certain defense requests for State funds to be made "confidentially." Penal Code section 987.9 does not allow defense requests for the appointment of co-counsel to be made confidentially. Absent any statutory exemption permitting the sort of confidential requests for funds made by the

petitioner in this case, it is the Attorney General's belief that there is no legal authorization for the confidential motions and hearings which have been conducted in this case. The Attorney General, therefore contends that the proceedings in this case are inconsistent with this State's Constitution, the public policy against secrecy in government, and are violative of the People's fundamental right to the due process of law guaranteed by the United States Constitution.

III

MOTION TO DISMISS PROCEEDINGS AS UNCONSTITUTIONAL.

Respondent Superior Court herein and the People move to dismiss this case because it has been unconstitutionally heard on the basis of a "confidential" record without any authority for it being so heard. As indicated, it is the opinion of the Attorney General that only judicial records that are expressly made confidential are not available for inspection by the general public. 53 Cal. Ops. Att'y Gen. 25-26, supra. Since the Legislature has not made motions of a criminal defendant for appointment of a second court-appointed attorney confidential, we contend that such motions cannot, consistent with this Court's status as a court "of record" (Cal. Const., art. VI, sec. 1), be made confidentially.

Moreover, because there exists no express authorization in this State's laws for confidential

motions on the appointment of counsel, it is the position of the Attorney General that such motions may not be heard ex parte under this State's Code of Judicial Conduct, Canon 3(A)(4). Penal Code section 987.9, the statute relied upon petitioner in this case, does not permit confidential motions for the appointment of counsel, and such motions cannot be considered on the basis of a sealed record. Any other conclusion means that this Court, without any statement of reasons therefor or legislative authority, has created its own category of secret proceedings. Such a Star Chamber-like review is totally alien to the fundamental concepts of constitutional government that have been practiced in this county for over two hundred years. Since this Court has not been authorized by the Legislature to hear this case in secret, confidential proceedings, it should be dismissed.

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CONCLUSION

For the foregoing reasons, as well as those stated in our petitions for rehearing, respondent and real party in interest request (1) that this Court's Order of April 15, 1982, be vacated as beyond this Court's jurisdiction; (2) that the motion to strike the second petition for rehearing be denied; and (3) that the proceedings herein be dismissed because Hearing was improvidently granted under the authority of a statute having no application to the appointment and/or funding of associate counsel.

DATED: June 3, 1982

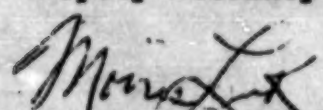
GEORGE DEUKMEJIAN, Attorney General
of the State of California

ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General - Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

WILLIAM D. STEIN
Assistant Attorney General

ANN K. JENSEN
Deputy Attorney General



MORRIS LENK
Deputy Attorney General

ML:pc
SF82MW0011

Attorneys for Real Party in Interest

E X H I B I T A

DECLARATION

I, Mimi Mendenhall, Office Service Supervisor I, am a custodian of records maintained by the California Attorney General, 6000 State Building, San Francisco, California. A diligent search of the records in the case of Keenan v. Superior Court, S.F. 24309, fails to reveal that the Attorney General was ever served with a motion to strike petition for rehearing and substitution of attorneys in the Keenan case.

Executed under penalty of perjury this 3rd day of June, 1982 at San Francisco, California.

MIMI MENDENHALL

E X H I B I T B

State of California
Department of Justice
George Deukmejian
(Pronounced Duke-may-jin)
Attorney General

SAN FRANCISCO 94102
(415) 557-2544

SUPREME COURT
FILED
FEB 23 1982
LAURENCE P. GILL, Clerk
Deputy

February 23, 1982

Honorable Laurence P. Gill, Clerk
California Supreme Court
4250 State Building
San Francisco, California 94102

Re: Keenan v. Superior Court (San Francisco)
No. 24309

Dear Sir:

You will find attached hereto a notice of substitution of attorneys for the respondent superior court. The respondent hereby adopts the arguments of the People, real party in interest, as contained in their Petition for Rehearing.

Very truly yours,

GEORGE DEUKMEJIAN
Attorney General

MORRIS LENK
Deputy Attorney General

ML:pc
Attachment

ATTORNEY GENERAL--OFFICE COPY

Crim. No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN FRANCISCO, Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	)

SUBSTITUTION OF ATTORNEYS

TO THE COURT AND COUNSEL FOR PETITIONER:

Please take notice that with the consent of the undersigned, the California Attorney General is hereby substituted as attorney of record for the Respondent, Superior Court of the State of California in and for the City and

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County of San Francisco.

DATED: February 23, 1982

HONORABLE DANIEL H. HANLON
Judge of the Superior Court

DATED: February 23, 1982

EDWARD P. O'BRIEN
Assistant Attorney General

DATED: February 23, 1982

GREGORY WINSLOW
Deputy City Attorney

EOB:kgw

DECLARATION OF SERVICE BY MAIL

Re: MAURICE JOHN KEENAN v. SUPERIOR COURT (San Francisco) No. 24309

I, Priscilla Clarfield declare that I am over 18 years of age, and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102. I served a true copy of the attached

SUBSTITUTION OF ATTORNEYS

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Honorable Arlo E. Smith, District Attorney
City & County of San Francisco
Hall of Justice
880 Bryant Street
San Francisco, California 94103

Honorable Carl M. Olsen, Clerk
City & County of San Francisco
Hall of Justice
880 Bryant Street, Room 316
San Francisco, California 94103

M. Gerald Schwartzbach
Attorney at Law
1770 Union Street
San Francisco, California 94125

Steven Diaz
Deputy City Attorney
City Hall
San Francisco, California 94102

Each said envelope was then, on February 23, 1982, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on February 23, 1982, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

Priscilla Clarfield
DECLARANT

E X H I B I T C

PROOF OF SERVICE

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause. My business address is 1779 Union Street, San Francisco, California 94123.

On April 27, 1982, I served a true copy of the attached REPLY TO BRIEF OF AMICUS CURIAE

by hand delivery on the following parties:

Hon. Daniel M. Hanlon
Judge of the Superior Court
City and County of San Francisco
Hall of Justice
850 Bryant Street
San Francisco, California 94103

Morris Lenk
Office of the Attorney General
State of California
6000 State Building
350 McAllister Street
San Francisco, California 94102

Ms. Leanette Flentroy
Office of the City Attorney
City and County of San Francisco
206 City Hall
San Francisco, California 94102

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 27, 1982 at San Francisco, California.

M. GERALD SCHWARTZBACH

M. GERALD SCHWARTZBACH

E X H I B I T D

PROOF OF SERVICE

I declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause. My business address is 1779 Union Street, San Francisco, California 94123.

On May 25, 1982, I served a true copy of the attached MOTION TO STRIKE PETITION FOR REHEARING

by hand delivery on the following parties:

The Honorable Daniel M. Hanlon
Judge of the Superior Court
City and County of San Francisco
850 Bryant Street, Hall of Justice
San Francisco, California 94103

Office of the City Attorney
City and County of San Francisco
City Hall
San Francisco, California 94102

Office of the Attorney General
6000 State Building
San Francisco, California 94102

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on May 25, 1982 at San Francisco, California.

Bruce E Cohen

BRUCE ERIC COHEN

E X H I B I T E

SUPREME COURT
FILED
FEB 8 1982
LAURENCE P. GILL, Clerk
Deputy

COPY

IN THE SUPREME COURTOF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN, Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; THE PEOPLE, Real Party in Interest.	S.F. 24309

Maurice Keenan, an indigent defendant charged with a capital offense, seeks a writ of mandate to compel respondent superior court to grant his motion for public funds to pay for the services of a second attorney to assist in the preparation of his defense. He relies on Penal Code section 987.9 as authority for this request.[1/] For the reasons that follow,

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1/ Section 987.9 provides:
"In the trial of a capital case the indigent defendant, through his counsel, may request the trial court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that such an application has been made shall be confidential and the contents of the application

E X H I B I T F

reasons why a second attorney is justified under the facts of this particular case, e.g., the complexity of the issues, the other criminal acts alleged, the large number of witnesses, the complicated scientific and psychiatric testimony, and the extensive pretrial motions, as to some of which review would be sought in the event of adverse rulings.[12/] The very purpose of section 987.9 is to provide the defendant additional assistance in a capital case when the circumstances warrant it; thus the court abused its discretion in failing to address the specific reasons advanced by Schwartzbach in support of the motion.

Moreover, the section provides that the court shall be guided by the need of the defendant for a "complete and full" defense. This language suggests that the Legislature intended that the court make a careful inquiry as to the need for additional assistance and that it apply a higher standard than bare adequacy to a defendant's request for assistance. If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a

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12/ The People denigrate defendant's problem by declaring that the practice of the prosecutor in San Francisco is to have only one attorney handle the case. That point overlooks the large staff of attorneys for the People readily available both for trial assistance and for the review process after denial of pretrial motions; defendant must pursue such review while preparing for trial, whereas the prosecutor has the assistance of the Attorney General's office for this purpose.

E X H I B I T G

this court. Bird, C. J., Mosk, J., Kaus, J., Broussard, J., Reynoso, J.

(1st Dist. A016097) — Dunning v. Superior Court of Contra Costa County; Dunning, Real Party in Interest. Petition for hearing granted. The matter is transferred to this court and retransferred to the Court of Appeal, First District, Division One, for consideration of the petition on its merits. Mosk, J., Richardson, J., Newman, J., Kaus, J., Broussard, J., Reynoso, J.

(2 Civ. 64680) — People v. Superior Court of Los Angeles County; Julie Ann Brooks, et al., Real Parties in Interest. Petition for hearing granted. The matter is transferred to this court and retransferred to the Court of Appeal, Second District, Division One, with directions to issue an alternative writ of mandamus to be heard before that court when the proceeding is ordered on calendar. Bird, C. J., Mosk, J., Richardson, J., Newman, J., Kaus, J., Broussard, J., Reynoso, J.

(2 Crim. 38620) — People v. Robert Angus Allan Ladd. Appellant's petition for hearing denied. The petition is ordered refiled as a petition for writ of habeas corpus. The Director of Corrections is ordered to show cause before the Court of Appeal, Second District, Division Three, when the proceeding is ordered on calendar, why the relief prayed for should not be granted. The written return shall be served and filed on or before April 19, 1982. Bird, C. J., Mosk, J., Richardson, J., Newman, J., Kaus, J., Broussard, J., Reynoso, J.

Orders were filed in the following matters extending the time within which to grant or deny a petition for hearing to and including the date indicated, or until a hearing is either granted or denied:

(1 Civ. 48054) — In re Marriage of Plummer. — May 11, 1982.

(1 Crim. 21610) — People v. Bruce A. White. — May 10, 1982.

(4 Civ. 26766) — Charles Leo Green v. Superior Court of San Diego County; People, Real Party in Interest. — May 7, 1982.

(4 Crim. 13490) — People v. Robert Frank [123 Cal.App.3d 771]. — May 12, 1982.

S.F. 24309 — Maurice John Keenan v. Superior Court of the City and County of San Francisco; People, Real Party in Interest [30 Cal.3d 750]. The time for granting or denying a rehearing in the above cause is hereby extended to and including May 7, 1982, or the date upon which a rehearing is either granted or denied.

L.A. 31199 — Marina Point, Limited v. Wolfson, et al. [30 Cal.3d 721]. Respondent's petition for rehearing denied. Mosk, J., and Richardson, J., are of the opinion that the petition should be granted.

(1 Crim. 22717 Div. 3) — People v. Deanne Elizabeth Abrens, et al. Appellants' petition for hearing denied. Bird, C. J., is of the opinion that the petition should be granted.

(3 Crim. 11470) — People v. Raymond William Smith. Appellant's petition for hearing denied. Bird, C. J., and Mosk, J., are of the opinion that the petition should be granted.

(5 Civ. 6507) — Teecaline v. Workers' Compensation Appeals Board, et al. [128 Cal.App.3d 843]. Petition of Sierra Vista Hospital for hearing denied.

L.A. 31547 — Roberto Lopez v. Court of Appeal, Second Appellate District [122 Cal.App.3d 939]. Kaus, J., did not participate. The Court of Appeal, Second District, Division Five is ordered to vacate its opinion filed August 24, 1981 in People v. Superior Court (Lopez), 2 Civ. 61498, and to refile same, transmitting a copy thereof to the superior court and parties pursuant to California Rules of Court 24(a), or do so. The written return shall be served and filed on or before April 21, 1982. Bird, C. J., Mosk, J., Richardson, J., Newman, J., Broussard, J., Reynoso, J.

Crim. 22395 — In re Johnny Ray Wakefield on Habeas Corpus. Pursuant to stipulation of the Attorney General, the San Francisco Superior Court is directed to amend its judgment of January 8, 1981 in People v. Johnny Ray Wakefield, No. 101685, to include credit pursuant to Penal Code section 2900.5 for 55 days of presentence custody between November 15, 1980 and January 8, 1981, and 28 days of good

E X H I B I T H

Marine Serf.

SUPREME COURT
FILED
APR 15 1982
LAURENCE P. GILL, Clerk

Amended

S.F. No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

MAURICE JOHN KEENAN,
Petitioner

v.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent;
PEOPLE, Real Party in Interest

The Motion to Strike Petition for Rehearing and Substitution of Attorney is GRANTED. The pertinent pages of the petition for rehearing filed by the Attorney General on February 23, 1982, will be regarded as an amicus curiae brief on the issue whether Penal Code section 987.9 authorizes allocation of funds for additional counsel in capital cases (see, e.g., pages 16 to 25 of the petition); and the parties are requested to submit replies by April 27, 1982.

The court further requests that consideration be given to the questions (1) whether section 987.2 or other provisions of the Penal Code permit the appointment of a second counsel in a capital case and (2) whether a request for and hearing on such an appointment should be confidential. Any briefs on these issues are to be filed on or before April 27, 1982, and replies to such briefs shall be filed on or before May 3, 1982.

Bird
Chief Justice

Newman
Justice

Bronson
Justice

Reynoso
Justice

Justice

Justice

Justice

DECLARATION OF SERVICE BY MAIL

Re: MAURICE JOHN KEENAN v. SUPERIOR COURT (San Francisco) No. 24309

I, Priscilla Clarfield declare that I am over 18 years of age, and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102. I served a true copy of the attached

MOTION TO VACATE ORDER OF APRIL 15, 1982, STRIKING PETITION FOR REHEARING AND SUBSTITUTION OF ATTORNEY; OPPOSITION TO MOTION TO STRIKE PETITION FOR REHEARING; MOTION TO DISMISS PROCEEDINGS

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Honorable Arlo E. Smith, District Attorney
City and County of San Francisco
Hall of Justice
880 Bryant Street
San Francisco, California 94103

Honorable Carl M. Olsen, Clerk
City and County of San Francisco
Hall of Justice
850 Bryant Street, Room 316
San Francisco, California 94103

Steven Diaz
Deputy City Attorney
City Hall
San Francisco, California 94102

1 copy Court of Appeal
(Hand delivered)

M. Gerald Schwartzbach
Attorney at Law
1779 Union Street
San Francisco, California 94125

Each said envelope was then, on June 3, 1982, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Executed on June 3, 1982, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

Priscilla Clarfield
DECLARANT

Rev. 3-20-80

SF 1

APPENDIX G

S.F. 24309

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,	)
Appellants,	)
vs.	)
MAURICE JOHN KEENAN,	)
Appellee.	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the People of the State of California and the Superior Court of the State of California, in and for the City and County of San Francisco, the above-named appellants, hereby appeal to the Supreme Court of the United States from the final judgment of the California Supreme Court ordering the confidential appointment of counsel to represent appellee, entered on May 6, 1982.

The appeal is taken pursuant to 28 U.S.C. section 1257(2).

DATED: July 14, 1982

GEORGE DEUKMEJIAN, Attorney General of the State of California

ROBERT H. PHILIBOSIAN, Chief Assistant Attorney General -- Criminal Division

WILLIAM D. STEIN
Assistant Attorney General

ANN K. JENSEN
Deputy Attorney General

MORRIS LENK
Deputy Attorney General

GEORGE AGNOST
City Attorney

THOMAS J. OWEN
Deputy City Attorney

Counsel for Appellants

CERTIFICATE OF SERVICE BY MAIL

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, Appellants, vs. MAURICE JOHN KEENAN, Appellee.	S.F. 24309

ANN K. JENSEN, a member of the Bar of the Supreme Court of the United States, states:

That her business address is 6000 State Building, in the City and County of San Francisco, State of California; that on July 14, 1982, she served a true copy of the attached Notice of Appeal to the Supreme Court of the United States in the above-entitled matter on counsel for appellee by placing same in an envelope addressed as follows:

M. Gerald Schwartzbach
Attorney at Law
1779 Union Street
San Francisco, California 94125

Said envelope was then sealed and deposited in the United States mail at San Francisco, California, with the postage theron fully prepaid.

ANN K. JENSEN

RECEIVED
SEP 24 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-105

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Appellants,

v.

MAURICE JOHN KEENAN,

Appellee.

On Appeal from the Supreme Court of California

MOTION TO DISMISS APPEAL

M. GERALD SCHWARTZBACH
1779 Union Street
San Francisco, California 94123
(415) 775-6262

Court-appointed attorney for
Appellee Maurice John Keenan

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-105

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Appellants,

v.

MAURICE JOHN KEENAN,

Appellee.

On Appeal from the Supreme Court of California

MOTION TO DISMISS APPEAL

Appellee, Maurice John Keenan, hereby moves that the appeal herein taken be dismissed on the grounds that (1) the cause has been rendered moot; (2) the appeal does not present a substantial federal question; and (3) the decision below was based on an adequate and independent state ground.

STATEMENT OF THE CASE

Apart from their continued use of the word "secret", with its necessary implication of impropriety, appellants have accurately summarized the procedural history of this case in their Jurisdictional Statement. Since the issuance of the opinion below and the filing of the Jurisdictional Statement, however, the following events have occurred that are relevant to this Court's consideration of the instant motion.

On July 29, 1982, proceedings were held in San Francisco Superior Court pursuant to the Peremptory Writ of Mandate issued

by the California Supreme Court. At those proceedings second counsel was appointed to represent Mr. Keenan. Prior to making the appointment, in open court and with the prosecution raising no objection, the court stated that it was doing so as an independent exercise of its discretion as well as in response to the mandate of the California Supreme Court. While the hearing concerning the request for the appointment of second counsel was briefly held ex parte and in chambers, it was immediately followed by the filing of a written general appearance in open court by the lawyer who had been designated as second counsel. On the same day that second counsel was appointed, a trial date of November 1, 1982 was set with the concurrence of the prosecution.

ARGUMENT

I.

BY NOT OBJECTING TO THE APPOINTMENT OF SECOND COUNSEL AND THE SETTING OF A TRIAL DATE, AND BY FAILING TO REQUEST FROM THIS COURT A STAY OF ALL PROCEEDINGS IN THE UNDERLYING CASE, APPELLANTS HAVE ALLOWED THE ISSUES RAISED IN THE JURISDICTIONAL STATEMENT TO BECOME MOOT.

Simply stated, this case concerns a dispute between Mr. Keenan and the appellants over whether or not a second lawyer should be appointed to defend Mr. Keenan. That dispute has now been fully resolved, and, despite his belief in its correctness, Mr. Keenan has no interest in defending the decision of the California Supreme Court in this Court. The appellants, by objecting to further proceedings in the trial court or asking this Court for a stay of proceedings, had avenues open to them through which they could have attempted to keep the controversy alive in order that it be resolved by this Court. This they did not do. Consequently, there is no controversy between the parties of sufficient immediacy and reality to justify review by this Court.

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II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellants' incorrect and tortured reading of the opinion below apparently leads them to conclude that the California Supreme Court has sanctioned the "secret" appointment of counsel to represent criminal defendants in violation of the federal constitutional rights of the People of the State of California. Nowhere in its opinion, however, does the California Supreme Court suggest that the actual appointment of second counsel be done other than in open court.

Appellants purport to acknowledge that the holding of an in camera hearing on a motion for second counsel, as allowed by the opinion below, would not offend their notion of federal constitutional principles as long as the ruling on the motion is then made in public session. (See Jurisdictional Statement at page 18.) Subsequently in their Jurisdictional Statement, however, they claim that such a procedure offends due process (see Jurisdictional Statement at page 29.) Whatever appellant's precise position is, it is clear that in allowing a criminal defendant to move ex parte for the appointment of a second lawyer, the California Supreme Court has not touched upon a substantial federal question warranting the attention of this Court. The principle that an indigent criminal defendant must be allowed to make a showing ex parte as to the need for funds to hire experts, investigators, and others to assist him in his defense in order to avoid being forced to compromise his Fifth Amendment rights is well settled. See, e.g., 18 U.S.C. §3006A(e); Marshall v. United States 423 F.2d 1315 (10th Cir. 1970). In Marshall, for example, a judgment of conviction was reversed because the trial court had erroneously required the defendant to testify and subject himself to cross-examination concerning the basis for his request that

the court appoint an investigator to investigate certain elements of his contemplated defense.

III.

THE OPINION BELOW RESTS ON ADEQUATE AND INDEPENDENT NON-FEDERAL GROUNDS.

As discussed above, it is the position of Mr. Keenan that this appeal does not present a substantial federal question. However, even if such a question was presented, it is absolutely clear that the opinion below rests on adequate and independent non-federal grounds. The portion of the opinion below with which appellants find fault reads as follows:

> To avoid undue disclosure of defense strategy, defendant is entitled to the application, by analogy, of section 987.9's provisions for confidentiality to the making and hearing of the motion for such appointment. (See Puett v. Superior Court (1979) 96 Cal.App.3d 936, 940, fn. 2 [158 Cal.Rptr. 266]; People v. Faxel, supra, 91 Cal.App.3d 327, 330, fn. 1.) (31 Cal.3d at 430.)

The footnote in Faxel to which the court makes reference, refers, in turn, to Allen v. Superior Court 18 Cal.3d 520 (1976), the leading California Supreme Court case on the constitutional propriety of prosecutorial discovery. And Allen, in which the California Supreme Court reversed a trial court's order requiring a criminal defendant to reveal to the prosecution the names and addresses of witnesses he intended to call, was based explicitly on the privilege against self-incrimination set forth in Article I, Section 15 of the California Constitution. Thus, even if the issue raised by the appellants was subject to any question under federal law, which it is not, the fact that the opinion below is based on a provision of the California Constitution would be reason enough for this Court to decline review.

//

CONCLUSION

The grounds for this appeal are fictitious and frivolous. Moreover, in pursuing the dual course of forcing Mr. Keenan to defend against this unwarranted appeal while at the same time literally fighting for his life in the trial court, appellants are engaging in a form of harassment which should not be countenanced by this Court. Consequently, this appeal should be dismissed for lack of jurisdictional requirements.

IT IS SO MOVED.

Respectfully submitted,

M. GERALD SCHWARTZBACH
Court-appointed attorney for
Appellee Maurice John Keenan

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IN THE

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Appellee.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The appellee, Maurice John Keenan, who is now held by the California Department of Corrections in San Quentin, California, asks leave to file the attached Motion to Dismiss Appeal without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The appellee's affidavit in support of this motion is attached hereto.

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Court-appointed attorney for
Appellee Maurice John Keenan

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AFFIDAVIT

I, Maurice John Keenan, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the appellee in the above-entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I do not believe that the appellants are entitled to the relief they seek in this case.

4. The nature of this case is briefly stated as follows: I petitioned the California Supreme Court for relief from denial of my pre-trial motion for a second attorney to be appointed to defend me in my pending death penalty case. The California Supreme Court granted the relief I requested, and ordered that a second attorney be appointed. The State of

California has appealed this ruling claiming that the action of the California Supreme Court has violated federal constitutional principles.

Maurice J. Keenan
MAURICE JOHN KEENAN

Duly witnessed and sworn to before me, a notary public, this 20th day of September, 1982.

Notary Public

No. 82-105

COPY

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OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

Appellants,

v.

MAURICE JOHN KEENAN,

Appellee.

On Appeal from the Supreme Court of California

REPLY BRIEF OPPOSIING MOTION TO DISMISS

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Attorney General of California
ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General-Criminal Division
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INTRODUCTION

To paraphrase, yet disagree with appellee, simply stated this appeal does not concern a dispute about whether or not appellee should have a second lawyer appointed to represent him (Motion to Dismiss at p. 2). We would not waste our own, much less this Court's time, by arguing about the need for a second lawyer in this case. Because if that were the only issue, we can assure this Court we would not be here. What this appeal does concern is the constitutionality of a procedure granting criminal defendants the unfettered right to move, ex parte, for the appointment of a second counsel, following which any judicial record on the motion is deemed "confidential."

In light of the tack taken by appellee, and particularly his claim of

"harassment" (Motion to Dismiss at p. 5), we remind this Court that the People did not file an ex parte motion in this case, taking it through the State trial, appellate, and supreme courts without providing notice or the opportunity for opposition to be heard. Nor did the People ever ask that judicial records in this case be sealed from public viewing. The grounds for this appeal are based on issues created by appellee, not the prosecution. Terms like "in camera" and "confidential" have not been imagined by the People; they have been memorialized in the Official Reports of the California Supreme Court.

We agree completely that the word "secret" has negative connotations, especially in a judicial system premised on openness, and bound by the First Amendment's right of free discussion of

governmental affairs. But, if secrecy in criminal proceedings be anathema, we need only look at the facts, newly disclosed by appellee, to see the troubling problems stemming from the ruling in this case: on July 29, 1982, a hearing was held (briefly according to appellee) ex parte and in chambers on the matter of the appointment of a second counsel (Motion to Dismiss at p. 2).[1] Are ex parte hearings in criminal cases, without notice to or contest by the opposition, to become ordinary, acceptable procedures before the court issues a decision in public session?

This Court should not be misled by appellee's attempt to minimize the

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1. That appellee has chosen to reveal these facts does not detract from their being done in the first place. Other ex parte proceedings need not be so disclosed. Besides, the contents of the ex parte hearing have not been revealed.

significance of a ruling which permits criminal defense counsel an opening wedge through the back door into a court's chambers, without notice to the prosecution, without opportunity for opposition, and without public review because records are to be sealed under a cloak of confidentiality. One would expect defendant to set forth reasons for having such an ex parte hearing, but appellee wholly fails to provide any. Instead, he seeks to insulate the challenged procedures by claims of (1) mootness, (2) lack of substantiality, and (3) adequacy of independent state grounds to support them. These defenses, however, as as lacking as the grounds for the challenged procedure.

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I

THIS CASE IS NOT MOOT BECAUSE COUNSEL HAS BEEN APPOINTED, OR BECAUSE THE PEOPLE DID NOT TRY TO DELAY THIS CASE FURTHER BY REQUESTING A STAY

Last term, in a case which appellants otherwise rely upon as forbidding the mandatory closure of criminal trial proceedings, this Court re-affirmed the rule that constitutional challenges to such closure orders are not rendered moot because a criminal trial has ended. If the underlying dispute between the parties is capable of repetition, yet evading review, it nevertheless presents a live controversy. Globe Newspaper Co. v. Superior Court, ___ U.S. ___, 73 L.Ed.2d 248, 254 (1982). This principle has also been applied to a challenge against the closure of a pretrial hearing in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976) The controversy in this case is obviously capable

of repetition yet evading review, not only because of the typically short duration of criminal trials, but also because the ex parte proceedings at issue, by their very nature, are specifically intended to evade public scrutiny, and hence, review.

Nor should consideration of the ruling here be defeated by the People's decision not to seek a stay of trial. This case has been pending trial since October of 1979, having been delayed until now by appellee's various pretrial motions relating to his court-appointed counsel. Clearly, it is not in the People's interest to prolong this proceeding any more than absolutely necessary. Mr. Keenan, having gained this long a reprieve, should not be permitted to trade his speedy trial rights (U.S. Const., Amend. VI) for a claim of mootness.

II

THE ISSUES IN THIS CASE RAISE SUBSTANTIAL FEDERAL QUESTIONS

Appellee charges that only an "incorrect and tortured reading" of the California Supreme Court's opinion leads us to conclude that the appointment of counsel will not be done in open court. Of course, this charge overlooks, and thus fails to address, the questions presented of whether a defense motion for second counsel can be made ex parte, in a confidential proceeding, with the record then sealed from public view, without offending the public's right to know about and discuss judicial proceedings, and their due process rights of notice and an opportunity to be heard on the defense request. Yet, even assuming, as appellee does, that the appointment will be made in open court, we again ask: What is the justification

for making the motion in camera on an ex parte basis? Why the prior restraint on the public learning that the motion has been made?

We do not believe, however, that any torturing of language is needed to reach the conclusion that by its ruling in this case the California Supreme Court has sanctioned the secret appointment of criminal defense counsel. California Penal Code section 987.9 has been construed by the Court below to apply, by analogy, to the making and hearing of a defense request for additional counsel. Keenan v. Superior Court, 31 Cal.3d 243, 250, 180 Cal.Rptr. 489, 492-493, 640 P.2d 108, 111-112. This statute provides that rulings on the reasonableness of defense investigative requests shall be made at in camera hearings. Because section 987.9 requires confidentiality, the

California Supreme Court ordered that appellee's request for second counsel be maintained in confidence and that the record remain confidential. 31 Cal.3d at p. 247, fn. 5, 180 Cal.Rptr. at 491, fn. 5, 640 P.2d at 110, fn. 5. Since the ruling on the defense requests for additional counsel would be made at in camera hearings, with the record to remain confidential, it should follow that the appointment of counsel would be accomplished in secrecy.[2/]

The issue of where and when the appointment of counsel actually occurs, however, has not been our primary focus. For it can be just as important to know that additional counsel was <u>not</u> appointed by the court. It is this

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2. Indeed in this case the denials of appellee's requests for second counsel were accomplished <u>ex parte</u> before the State trial and appellate courts.

ruling which is much more likely to engender later appellate court challenge, and about which the public undoubtedly has a right to know. The more significant fact, therefore, is that the request for counsel has been made. It is this motion which the California Supreme Court has permitted to be made in camera. It is the ex parte hearing on the motion, without first establishing a need for such, or affording the prosecution an opportunity to be heard, which we submit is constitutionally suspect.

Appellee cites but one appellate court decision, Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970) in support for the statement that a showing on the need to hire experts, investigators and others can be ex parte under the authority of 18 U.S.C. § 3006A(e). Marshall does not assist appellee, however, since

this decision expressly recognizes the distinction between the appointment of counsel for federally prosecuted indigents under 18 U.S.C. § 3006A(b) and the service of others than counsel under subsection (e). 423 F.2d at 1317. The former subsection "contemplates 'appropriate inquiry' by the court as to defendant's claimed need[.]", whereas the latter "requires an ex parte proceeding to test the necessity of 'investigative, expert, or other, services' . . . ." Ibid. Marshall hardly permits an ex parte motion for or hearing on the need for counsel.

Although appellee claims confusion about our position on the nature of any hearing (Motion to Dismiss at p. 3), the matter can be restated in plain language. Motions for appointment of counsel must be made in open court

with notice to the prosecution, and allowing for the opportunity to be heard. If a Fifth Amendment claim of privilege is asserted by the defendant, this portion of the hearing can be held in camera, with the trial court then stating its ruling, including the basis therefore, in open court. As the matter now stands, the mere making of a motion is deemed to be privileged without any justification whatsoever, and the record is then sealed.

We think it telling that appellee has chosen one single aspect of the questions presented in the Jurisdictional Statement to which he attempts a response. He fails to address the major issue, that of the public's rights under the First Amendment to know about and to discuss judicial proceedings. No effort has been made to give reasons for allowing defense

motions to be made and then heard ex parte. Appellee utterly fails to justify the decision below with the constitutional requirement that criminal trials be open to the public, and the public's presumptive right of access to judicial records.

III

THERE IS NO ADEQUATE AND INDEPENDENT BASIS FOR THE DECISION BELOW, BECAUSE THAT DECISION IS REPUGNANT TO THE UNITED STATES CONSTITUTION

Appellee's final argument for avoiding federal review is that the decision below rests on Article I, Section 15 of the California Constitution, which reads in pertinent part, "[p]ersons may not . . . be compelled in a criminal case to be a witness against themselves, ..." How a criminal defendant's mere request for the appointment of a second counsel compels him to incriminate himself is left unexplained by appellee. Indeed,

if this were the case, then in every criminal trial when a defendant appears without counsel, the court would have to hold in camera hearings to determine whether the defendant wishes to have counsel appointed. Cf. Faretta v. California, 422 U.S. 806 (1975). The supposedly adequate and independent state ground posited by appellee is nonexistent.

But for its misconstrued analogy to Penal Code section 987.9, there is no basis in California law for ex parte hearings on the appointment of counsel. A defense attorney is not a witness, whose identity the defendant may wish to conceal. Here, appellee has chosen to tell this Court co-counsel's name (see appellee's request for extension of time, dated August 19, 1982). Where co-counsel is thus identified to the Court, what possible reason can there be for hiding

the request for his appointment? We submit there is none.

CONCLUSION

Pretrial appointment of defense counsel is one of the components of a criminal trial about which the public undoubtedly has a vested constitutional right to know. The denial of the public's right of access to this part of a criminal trial proceeding constitutes a clear abridgement of the First Amendment. Nothing that appellee has said can change the challenged ruling in this case, which holds that motions for the appointment of counsel can be made and heard ex parte, with the motion being deemed confidential and not subject to public scrutiny. Such a mandatory closure of the State's courtrooms, absent any justification whatsoever, violates the public's First Amendment rights, as was recently held in the Globe Newspaper

Co. case, supra. We ask that the judgment below be vacated for reconsideration in light of that case, or alternatively, that the matter be set for plenary consideration and full briefing and argument.

DATED: October 8, 1982

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